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No. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

A. O. SMITH CORPORATION,

Petitioner,

v.

DARREL C. NOTTELSON,

Respondent,

and

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Intervenor-
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Questions Presented

1. Does Title VII §701(j) of the Civil Rights Act, on its face and as applied, violate the Establishment Clause of the First Amendment?

2. Under this Court's standard for determining undue hardship in TWA v. Hardison, did Smith meet the reasonable accommodation requirement of Title VII §701(j)?

3. Does Title VII §701(j) create an exception to or modification of the NLRB §8(a)(3) sanction of union security clauses?

4. Should Smith be required to pay attorneys' fees to Nottelson when his church retained and compensated his attorney?

In addition to the parties listed in the caption, Smith Steel Workers D.A.L.U. 19806, AFL-CIO was a party defendant in the District Court action and filed a separate appeal to the Court of Appeals and a petition for rehearing. A. O. Smith Corporation has no parent. All but two of its subsidiaries, A. O. Smith-Inland Inc. and Metalsa, are either wholly owned directly by Smith or indirectly through its subsidiaries. None of its subsidiaries or other enterprises in which Smith owns an interest is known to have publicly traded securities.

TABLE OF CONTENTS

	PAGE
Table of Authorities.	v
Opinions Below.	2
Jurisdiction.	2
Statutes.	3
Statement of the Case	3
A. Facts	5
B. The Proceedings Below	11
Summary of Reasons For Granting The Writ.	14
Reasons for Granting the Writ	
I. THE SEVENTH CIRCUIT'S HOLDING THAT TITLE VII SECTION 701(j) DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE CONFLICTS WITH PREVAILING JUDICIAL INTERPRETATIONS AND IMPROPERLY CONSTRUES CONGRESSIONAL INTENT .	19
A. The Court of Appeals' Decision Is Contrary To Prevailing Judicial Interpretation.	21
B. The Court of Appeals' Holding That Title VII Section 701(j) Does Not Violate The Establishment Clause is Clearly Erroneous	23
C. This Court Should Settle The Constitutionality Question Involving Title VII Section 701(j). . . .	35

PAGE

II. THE SEVENTH CIRCUIT'S HOLDING THAT SMITH FAILED TO MEET ITS OBLIGATION TO ACCOMMODATE NOTTELSON'S RELIGIOUS BELIEFS IS SQUARELY CONTRARY TO THIS COURT'S RULING IN HARDISON AS WELL AS TITLE VII. 38

III. THE SEVENTH CIRCUIT'S HOLDING THAT TITLE VII SECTION 701(j) CREATES AN EXCEPTION TO THE NLRA §8(a)(3) SANCTION OF UNION SECURITY CLAUSES IS CONTRARY TO THE INTENT OF CONGRESS, IS BASED ON UNFOUNDED AUTHORITY AND IS INCORRECT 46

IV. THE SEVENTH CIRCUIT'S HOLDING WITH RESPECT TO THE AWARD OF ATTORNEY'S FEES TO NOTTELSON WAS ERRONEOUS 54

Conclusion. 58

APPENDICES:

A. Opinion of the United States Court of Appeals For the Seventh Circuit A-1
B. Opinion of the United States District Court For the Eastern District of Wisconsin . B-1
C. Legislative History of Title VII Section 701(j). C-1
D. Constitutional Provision and Statutes. D-1
E. Order of the United States Court of Appeals for the Seventh Circuit Denying Smith's Petition for Rehearing and Suggestion for Rehearing En Banc (April 20, 1981). E-1

TABLE OF AUTHORITIES

CASES	PAGE
Anderson v. General Dynamics Convair Aerospace Div., 489 F.Supp. 782 S.D. Cal. 1980), No. 80-5373, Slip op.___F.2d___ (9th Cir 1981)..	26,36,60
Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2nd Cir), cert. denied, 419 U.S. 1093 (1974).....	48,61
Burns v. Southern Pacific Transportation Co., 389 F.2d 403 (9th Cir 1979), rem'd 23 FEP 1229.....	36,60
Committee for Public Education and Religious Liberties v. Nyquist, 413 U.S. 756 (1973).....	15,24 27,56
Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163 (1976) Cert. denied, 433 U.S. 908 (1977)..	51,52,53
Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir 1975) affirmed 429 U.S. 65 (1976).....	36,60
Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222 (1952).....	49
Gavin v. Peoples Natural Gas, 464 F.Supp. 622 (W.D. Pa. 1979).....	36,60
Gillette v. United States, 401 U.S. 437 (1971).....	28
Gray v. Gulf, Mobile and Ohio Railroad Co., 429 F.2d 1064 (5th Cir 1970), cert. denied, 400 U.S. 1001 (1972).....	48,61

PAGE

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971)..... 25

Hammond v. United Papermakers and Paperworkers Union, 462 F.2d 174 (6th Cir), cert. denied, 409 U.S. 1028 (1972)..... 48,61

Hicks v. Miranda, 422 U.S. 332 (1975). 22

Isaac v. Butler's Shoe Corp., 25 FEP Cases 828 (N.D. Ga. 1980)..... 36,61

Johnson v. Georgia Highway Express Inc., 488 F.2d 714 (5th Cir 1974).. 57

Jordan v. North Carolina Nat'l. Bank, 399 F.Supp. 172 (W.D. N. Car. 1975)..... 36,60

Linscott v. Millers Falls Co., 316 F.Supp. 1369 (D. Mass. 1970), aff'd 440 F.2d 14 (1st Cir), cert. denied, 404 U.S. 872 (1971).. 48,61

McDaniel v. Essex International, 571 F.2d 338 (1978)..... 36,47,52 53,60

Morton v. Mancari, 417 U.S. 535 (1974)..... 49

Muniz v. Hoffman, 422 U.S. 454 (1975). 49

National Treasury Employees Union v. United States Department of the Treasury, CA DC, Slip Op. No. 78-1085, June 19, 1981..... 58

New York v. Cathedral Academy, 434 U.S. 125 (1977)..... 34

N.L.R.B. v. The Catholic Bishop of Chicago, 440 U.S. 490, 99 S.Ct. 1313 (1979)..... 20,34,35

PAGE

Railway Employees Department v. Hanson, 351 U.S. 225 (1956)..... 48,61

Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, appeal dismissed, 444 U.S. 986 (1979)..... 14,15,21, 22,23

Redmond v. G.A.F. Corp., 574 F.2d 897 (1978)..... 42

Sherbert v. Verner, 374 U.S. 398 (1963)..... 30,60

Sprogis v. United Air Lines, 517 F.2d 387 (7th Cir 1975)..... 56,57

Thomas v. Review Board of the Indiana Unemployment Security Division, ___U.S.___, (1981)..... 30,60

Tooley v. Martin-Marietta Corp., 476 F.Supp. 1027 (D. Ore. 1979)..... 20,36, 53,60

Trans World Airlines v. Hardison, 432 U.S. 63 (1977)..... 17,18,38 39,40,41,42,43,45,46,51

Union Starch & Refining Co. v. National Labor Relations Board, 186 F.2d 1008 (1951)..... 53,54

United States v. Ryder, 110 U.S. 729 (1884)..... 49

Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970..... 30,60

Yott v. North American Rockwell, 501 F.2d 398 (9th Cir 1974), 428 F.Supp. 763 (C.D. Cal. 1977).....29,36 50,60

PAGE

Constitutional Authority:
U. S. Constitution, Amendment I..... passim

Congressional Record:
118 Congr. Rec. 705-706 (1972)..... 25,49
52,60

Statutes:
Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e et seq.)
Section 701(j)..... passim
Section 703(a)(1)..... passim
National Labor Relations Act (29 U.S.C. §158)
Section 8(a)(3)..... passim
P.L. 96-593..... 51
28 U.S.C. §1254(1)..... 2

Bills:
S. 2109, 93rd Cong., 1st Sess. (1973). 50,61
S. 2239, 95th Cong., 1st Sess. (1977). 50,61
S. 1693, 96th Cong., 1st Sess. (1979). 50,61
H.R. 16541, 93rd Cong., 2nd Sess. (1974)..... 50,61
H.R. 1528, 94th Cong., 1st Sess. (1975)..... 50,61
H.R. 14911, 94th Cong., 2nd Sess. (1976)..... 50,61
H.R. 14913, 94th Cong., 2nd Sess. (1976)..... 50,61
H.R. 14916, 94th Cong., 2nd Sess. (1976)..... 50,61
H.R. 14920, 94th Cong., 2nd Sess. (1976)..... 50,61
H.R. 352, 94th Cong., 1st Sess. (1977)..... 50,61
H.R. 9009, 95th Cong., 1st Sess. (1977)..... 50,61
H.R. 9113, 95th Cong., 1st Sess. (1977)..... 50,61
H.R. 9368, 95th Cong., 1st Sess. (1977)..... 50,61

PAGE

H.R. 9596, 95th Cong., 1st Sess. (1977)..... 50,61
H.R. 4774, 96th Cong., 1st Sess. (1979)..... 50,51,61

Miscellaneous:
Equal Employment Opportunity Commission, Sixth Annual Report, p.12 (1972)..... 50
Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Religion, 176 Daily Lab. Rep. F-1, at F4 (BNA Sept. 9, 1980).....16,17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner A. O. Smith Corporation (herein "Smith") petitions for a writ of certiorari to the decision of the United States Court of Appeals for the Seventh Circuit, dated February 27, 1981, affirming the decision of the District Court for the Eastern District of Wisconsin.

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 643 F.2d 445 and is annexed to this Petition as Appendix A.[1] The opinions of the United States District Court for the Eastern District of Wisconsin, two of which are reported at 481 F.Supp. 756 and 489 F.Supp. 94, are annexed as Appendix B.

Jurisdiction

The decision of the United States Court of Appeals for the Seventh Circuit was filed on February 27, 1981. Smith's timely Petition for Rehearing and Suggestion for Rehearing En Banc was denied on April 20, 1981. A copy of the order denying that petition is annexed as Appendix E. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

[1] Texts of all footnotes begin on page 60.

Constitutional Provisions and Statutes

The constitutional provision involved in this petition is the First Amendment to the Constitution of the United States, and the statutory provisions involved in this petition are Sections 701(j) and 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1) and (j), and Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 U.S.C. §158 (a)(3), all of which are reproduced in relevant part in Appendix C hereto.

Statement of the Case

This is an action commenced under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et seq., by Darrel C. Nottelson against his employer, Smith, and his union, Smith Steel Workers D.A.L.U. 19806, AFL-CIO (herein the "Union"), alleging inter alia that Smith and the Union had engaged in unlawful employment practices with respect to

Nottelson on account of his religious convictions.

On September 2, 1977 the case was heard by the United States District Court which entered a Memorandum and Order on December 7, 1979 (Appendix B) resolving this matter in favor of Nottelson. Both Smith and the Union were found to have engaged in unlawful employment practices with regard to Nottelson on account of his religious convictions in violation of Title VII of the Act in that they failed to reasonably accommodate to Nottelson's religious objection to the payment of Union dues.

In response to motions for reconsideration filed by Smith and the Union, the District Court entered a second Memorandum and Order (Appendix B) on April 18, 1980 in which it clarified several unresolved issues, and upheld the constitutionality of §701(j) of the Act. The

District Court also entered a final judgment (Appendix B) on such date.

The Court of Appeals affirmed the District Court's decision with one slight modification of the computation of damages (Appendix A).

This Petition presents the Court with an opportunity to (a) insure uniform adherence to applicable decisions of this Court and (b) clarify an important question of federal law - Does 701(j) violate the Establishment Clause of the First Amendment? - which issue has been decided by federal district courts and courts of appeals but has not yet been resolved by this Court. The questions presented by this Petition are of fundamental importance to the orderly resolution of numerous pending and future Title VII religious discrimination cases.

A. Facts

Nottelson, a production worker at

Smith and a Union member since October 30, 1947 and a member of the Seventh-day Adventist Church since 1966, refused to pay dues to the Union (or otherwise support or remain a member of the Union) in January, 1975. He contended that his religious beliefs prohibited him from being a member of or financially or otherwise supporting a labor union. As a result of his refusal to pay union dues, or the financial equivalent thereto to the Union, Nottelson was expelled from the Union on April 15, 1975. He was discharged from Smith on July 11, 1975 pursuant to the Union's demand and the union security clause contained in the collective bargaining agreement between Smith and the Union. Union security clauses were contained in the collective bargaining agreements between Smith and the Union for many years.

Commencing in December, 1974, the

time when he notified the Union of his decision respecting union membership and dues, Nottelson met with Union representatives on a number of occasions, several times accompanied by elders from his church, in an attempt to reach a satisfactory resolution of the problem created by such decision. He suggested, as an accommodation, payment to a non-union, nonreligious charitable organization in lieu of dues to the Union.

On February 4, 1975 the Union executive board denied Nottelson's request for accommodation on the grounds that it was contrary to the Union's Constitution and Bylaws as well as the collective bargaining agreement between the Union and Smith. In March the Union notified Nottelson that members who are in arrears on their union dues are ineligible to remain employees of Smith and that he would be expelled from the Union if he did not pay his arrearage.

Smith initially learned of Nottelson's religious belief and the potential conflict between his religious belief and the union security clause on March 11, 1975 when a director of the Seventh-day Adventist Church contacted Smith's manager of personnel. Smith met with the Union in an attempt to resolve the apparent conflict between Nottelson's religious convictions and the union security clause. Smith informed the Union that it was willing to waive compulsory union membership and dues as a condition of employment. The Union was unwilling to waive the dues requirement. Smith also suggested payment of union dues to a charity or, alternatively, payment of monthly dues into an escrow account, pending resolution of Nottelson's dilemma. The charitable dues accommodation suggested by Smith was unacceptable to the Union, and the escrow proposal was unacceptable to both the

Union and Nottelson.

Nottelson asked to appear before the Union executive board a second time for reconsideration of his request. Although aware of the AFL-CIO policy which permitted accommodation along the lines of Nottelson's suggestion, the executive board on April 8, 1975 took the position that granting Nottelson's request would be contrary to the Union's Constitution and Bylaws. Nottelson appealed the executive board's decision to the union membership, but the union membership did not overturn the executive board's decision.

Upon learning that his employment was to be terminated for nonpayment of union dues, Nottelson sought and obtained a temporary restraining order from the District Court on April 30, 1975. On May 1, 1975 Nottelson returned to work under the temporary restraining order.

On May 7, 1975 the Union informed

Nottelson that the Union was willing to relieve him from remaining a member of the Union, however he would continue to be required to pay a monthly dues equivalent payment to the Union for services both past and present rendered. This proposal was unacceptable to Nottelson.

The District Court denied Nottelson's request for a permanent injunction on July 10, 1975. At the Union's insistence, Smith informed Nottelson not to report for work on July 11, 1975. At this time Nottelson inquired whether 1) a reverse seniority layoff could be effected for a two-year period to build retirement credit and 2) a nonunion job could be given to him provided he would not be required to work from sundown Friday through sundown Saturday. Smith was unable to grant either of the last minute requests because 1) the labor agreement did not permit reverse seniority layoffs and 2) the only

nonunion jobs were supervisory positions and most of these positions related to areas with which Nottelson was not familiar. During this period the economy was slow, and Smith filled only three supervisory positions in areas in which Nottelson may have been qualified. None of these positions was vacant on July 11, 1975. Moreover, Nottelson requested a nonunion job, not because he wanted to become a supervisor, but solely as an accommodation to his religious beliefs. In his twenty-seven years at Smith, Nottelson had not expressed an interest in or attempted to qualify under established procedures for a supervisory position. Accordingly Nottelson's employment was terminated on July 11, 1975.

B. The Proceedings Below

The District Court heard this matter on September 2, 1977, and on December 7, 1979 the Court entered a Memorandum and

Order resolving the case in favor of Nottelson and found both Smith and the Union had engaged in unlawful discrimination with regard to Nottelson in violation of the Civil Rights Act of 1964. The Court entered a Second Memorandum and Order on April 18, 1980 disposing of various issues, previously left unanswered.

On April 18, 1980 the District Court entered a final judgment in favor of Nottelson, and ordered Nottelson reinstated to his former position, together with all back pay (offset by interim earnings and unemployment compensation), attorneys' fees and costs to be shared equally by Smith and the Union (App. B-10). The Court further ordered that the Union accommodate Nottelson's religious convictions and that Nottelson pay an amount equivalent to union dues to a

nonunion, nonreligious charitable organization mutually agreed upon by Nottelson and the Union. Smith filed a timely appeal of those portions of the District Court's final judgment that adversely affected its rights.

The Court of Appeals entered a decision on February 27, 1981 affirming the District Court's opinion. The Court of Appeals confirmed the District Court's holdings that: 1) a union security provision pursuant to Section 8(a)(3) of the National Labor Relations Act is not an exception to or exemption from the accommodation requirements of Section 701(j) of Title VII (App. A-5), 2) the anti-discrimination provisions of Title VII take priority over the NLRA union security provisions (App. A-5), 3) Smith and the Union could have accommodated Nottelson without undue hardship (App. A-5), and 4) section 701(j) does not offend the First

Amendment (App. A-16).

On April 20, 1981 the Court of Appeals considered the timely petition for rehearing and suggestions for rehearing en banc filed by Smith and denied the petition for rehearing.

Summary of Reasons For Granting The Writ

The Court should grant the writ of certiorari in order to (a) settle an important question of federal law, namely to determine the constitutionality of §701(j) of the Civil Rights Act, which question has been decided by federal district courts and courts of appeal, but has not yet been resolved by this Court, and (b) insure uniform adherence to applicable decisions of this Court.

The decision of the Court of Appeals in this action is incorrect insofar as it purports to be bound by the decision of a state supreme court in Rankins v. Commission on Professional Competence, 24 Cal.

3d 167, 593 P.2d 852 (1979), which held that the state constitution's religious discrimination provision could be construed to contain a religious accommodation requirement. Clearly, the Court of Appeals, in reviewing the constitutionality of the federal statutory requirement, was not bound by the holding in Rankins.

The Court of Appeals' determination that §701(j) would pass muster under the Establishment Clause of the First Amendment was incorrect under the standard enunciated by this Court in Committee for Public Education and Religious Liberties v. Nyquist, 413 U.S. 756 (1973). The legislative history of §701(j) establishes that the purpose of the amendment was to directly assist and advance the interests of certain religious sects. The application of §701(j) has the primary effect of advancing the interests of religionists

over nonreligionists as well as the beliefs of one sect over those of another. Finally, in view of the fact that the initial inquiry in any failure to accommodate case is the nature, bona fides and sincerity of the plaintiff's asserted religious beliefs, §701(j) necessarily entangles government in religion.

This Court should consider and resolve the §701(j) constitutionality issue in order to put an end to the era of uncertainty which has existed in light of the numerous conflicting decisions which have emerged in the last several years. Although at the present time there is no conflict among the circuits, there remain pending a number of cases with conflicting results and strong dissents. Moreover, the Equal Employment Opportunity Commission has recently adopted revised guidelines which establish accommodation requirements that go beyond even the

provisions of §701(j) and, in effect, establish a mandate for religious discrimination. The time is ripe for this Court to assess the constitutionality issue and resolve the uncertainty surrounding the accommodation provision - for the benefit of the courts, enforcement agencies, employers and employees.

The Court of Appeals' holding that Smith failed to meet its obligation to accommodate Nottelson's religious beliefs is squarely contrary to this Court's ruling in Trans World Airlines v. Hardison, 432 U.S. 63 (1977). This Court has interpreted the §701(j) accommodation provision to require no more than a de minimus cost to the employer. The Court of Appeals abrogated that standard when it held there was no undue hardship to require Smith to violate its collective bargaining agreement and assume the costs of a NLRA §8(a)(3) violation in order to

accommodate Nottelson under Title VII.

In reaching a conclusion that Smith had violated Title VII, the Court of Appeals failed to consider the evidence concerning Smith's willingness and attempts to accommodate Nottelson. Moreover, the Court of Appeals never made a determination of whether the costs to Smith under the proposed accommodation were more than de minimus, as provided in Hardison, supra.

The Court of Appeals' determination that Title VII §701(j) creates an exception to the NLRA §8(a)(3) sanction of union security clauses is contrary to the intent of Congress, based on unfounded authority and incorrect. There is no evidence of Congressional intent to make the §701(j) accommodation requirement an exception to the union security clause authorization under NLRA §8(a)(3). This Court has held on numerous occasions that

a clear expression of intent is required for changes of law or policy. Moreover, the legislative history of numerous proposed amendments to §8(a)(3) clearly demonstrates that Title VII had not created an exception to the union security proviso. In addition, the only case authority cited by the Court of Appeals as the basis for its decision is without foundation.

The award of attorneys' fees by the Court of Appeals, without regard to the underlying circumstances, was improper. The Court of Appeals should have reviewed the arrangement under which the Seventh-day Adventist church retained and compensated Nottelson's attorney.

Reasons For Granting The Writ

I. THE SEVENTH CIRCUIT'S HOLDING THAT TITLE VII SECTION 701(j) DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE CONFLICTS WITH PREVAILING JUDICIAL INTERPRETATIONS AND IMPROPERLY CONSTRUES CONGRESSIONAL INTENT

The Court of Appeals addressed the the §701(j) constitutionality issue and concluded that the District Court correctly adopted the holding in Tooley v. Martin-Marietta Corp., 476 F.Supp. 1027, 1030 (D. Ore. 1979), that §701(j) "promotes the free exercise of religion without violating the Establishment Clause." (App. A-16).

The consideration of the constitutionality question by the Court of Appeals was proper in light of its finding that the conduct of Smith and the Union violated Title VII (App. A-10 and A-12). Where a court concludes that the conduct of the employer or union violated Title VII, it is also ". . .required to decide whether [that statutory provision] was constitutionally permissible under the Religion clauses to the First Amendment." N.L.R.B. v. The Catholic Bishop of

Chicago, 440 U.S. 490, 99 S.Ct. 1313, 1318 (1979).

Smith submits, however, that the Court of Appeals' holding conflicts with prevailing judicial interpretation and improperly construes Congressional intent, and, accordingly, should be set aside. Moreover, the constitutionality of §701(j) involves an important question of federal law which has not been, but should be, decided by this Court.

A. The Court of Appeals' Decision Is Contrary To Prevailing Judicial Interpretation

Contrary to the assertions of the Court of Appeals, the federal constitutional question was not determined by this Court in its summary dismissal of the appeal in Rankins v. Commission on Professional Competence, 24 Cal. 3d 367, 593 P.2d 852, appeal dismissed, 444 U.S. 986, 100 S.Ct. 515 (1979). The Court's action concerned a state court holding that the

state constitution's religious discrimination provision could be construed to contain a religious accommodation requirement. The constitutionality of the federal statutory requirement was not at issue; neither were the federal legislative history and intent of the federal legislature called into question. Indeed, the California Supreme Court recognized that the constitutional validity of §701(j) under the Establishment Clause "has not been directly decided by the United States Supreme Court." 593 P.2d at 858.

The Court of Appeals' reliance on Hicks v. Miranda, 422 U.S. 332, 343-344 (1975) to conclude that Rankins, supra was a decision on the merits was improper. In Hicks this Court held that a federal district court was bound by this Court's summary dismissal of an appeal of a California court's earlier ruling sus-

taining the "constitutionality of the very California obscenity statute which the District Court had declared unconstitutional. . . ." 422 U.S. at 340 (emphasis added). Here, a federal, not state, question is involved and federal court review is not foreclosed. Furthermore, as the dissent (App. A-21) points out, the "striking differences" between the facts and circumstances of Rankins and the instant case so distinguish the two actions that the dismissal of the Rankins appeal cannot be binding upon the Court of Appeals.

B. The Court of Appeals' Holding That Title VII Section 701(j) Does Not Violate The Establishment Clause Is Clearly Erroneous

The First Amendment to the Constitution provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free

exercise thereof. . . ."

In Committee for Public Education and Religious Liberties v. Nyquist, 413 U.S. 756, 772-773 (1973), this Court discussed the approach for analyzing whether a statute is in violation of the Establishment Clause:

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose,. . .second, must have a primary effect that neither advances nor prohibits religion,. . .and, third, must avoid excessive government entanglement with religion. . . .[citations omitted.]

The Court of Appeals acknowledged that the Nyquist test was applicable, but wrongly concluded that §701(j) would pass muster under the Establishment Clause.

Analyzing the first part of the Nyquist test, the Court of Appeals found that §701(j) has a secular purpose by looking at the accommodation provision in terms of the "adverse effect" (of facially neutral majoritarian employment practices)

ruling in Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971), although the Griggs case dealt with neither a religious discrimination issue nor a First Amendment Constitutional question. The true purpose of the accommodation provision is clearly evident in the remarks of Senator Jennings Randolph.[2] In response to earlier court rulings regarding the objections of Sabbatarians to employment schedules as well as the urgings of certain religious sects including his own (Seventh Day Baptist Church), Senator Randolph introduced the 1972 §701(j) amendment to Title VII to advance the aims of various minority religions. He made no mention of any business necessity or benefit to the general public, and no clearly secular legislative purpose is manifested. Indeed, it is evident that the purpose of this amendment was to aid certain sects by giving them a statutory

"right" to have their Sabbath practices accommodated by employers. As stated by Judge Schwartz in Anderson v. General Dynamics Convair Aerospace Div., 489 F.Supp. 782, 790 (S.D. Cal. 1980):

> In essence, the accommodation provision mandates religious discrimination. It requires an overt preference for the religious beliefs of certain employees and dictates that an employer must go out of his way to accommodate minority beliefs, even if such accommodation is detrimental to other employees. As such, its operation runs directly contrary to the avowed purpose of Title VII.

The Seventh Circuit attempted to sidestep the clearly sectarian thrust of Senator Randolph's remarks in support of §701(j) by stating that the purpose of the statute's anti-discrimination provisions is to protect employment opportunities and eliminate the burden on individuals who would otherwise have to choose between their jobs and their religious convictions. This assertion is more appropriately advanced under §703(a)(1)

which is the statutory provision against religious discrimination in employment. However, the constitutionality of §703(a)(1) is not in question here. At issue is the expressly stated and primary purpose in the passage by Congress of §701(j), of advancing the interests of certain religious sects. Furthermore, the fact that a statute may have a legitimate purpose is not controlling if "it also has the direct and immediate effect of advancing religion." Committee For Public Education v. Nyquist, supra, 783 fn.39. "Such secular objectives, no matter how desirable. . .cannot serve today anymore than they could 200 years ago to justify. . .a direct and substantial advancement of religion." Id.

The second part of the Nyquist test was met, according to the Court of Appeals, because application of §701(j) does not have the primary effect of advancing

the interests of religionists over non-religionists or the beliefs of one sect over those of another. (App. A-14 and A-15). The Court of Appeals compares §701(j) to the statutory exemption to military service for conscientious objectors, which requires no particular sectarian affiliation or theological position and promotes only "the principal of supremacy of conscience," upheld in Gillette v. United States, 401 U.S. 437, 453 (1971).

Contrary to the Court of Appeals belief, the draft exemption cases do not provide the appropriate standard against which to measure the viability of §701(j). The draft exemption cases do not, as does §701(j), establish that Congress has the constitutional authority to require private employers to accommodate religious beliefs. Instead they approve the authority of Congress to exempt religionists

from military service obligations imposed by the government. Rather than establishing or advancing the beliefs of these religionists, the draft exemption was enacted out of the concern that the demands of a secular state may not override fundamental principles of conscience and religious duty. The question of whether the government may impose upon private employers a duty to give preferences to certain religious beliefs is not resolved by those decisions.

Religious accommodation cases usually do not present tensions between government requirements and religious beliefs, but rather involve the authority of the government to legislate affirmatively to advance religious beliefs in a manner that may require employers such as Smith to treat religious employees differently than other employees. As stated so aptly by the Ninth Circuit in Yott v. North American

Rockwell Corp., 501 F.2d 398, 400 (1974): "Nor can we hold. . .that conscientious objector military service cases are similar. No law of the land requires plaintiff to work only at N.R." The rationale that would restrain the federal government power to enforce military conscription cannot be applied to a congressional decision that religious beliefs of an employee are paramount to the nondiscriminatory business practices of an employer when each private party, employee and employer, is equally entitled to the same First Amendment protections.

Similarly, the "public welfare legislation" cases do not provide an appropriate standard against which to measure the constitutionality of §701(j).[3] These cases involve statutes enacted by a state or the federal government, such as unemployment compensation laws, and a conclusion by the court that the benefits

afforded under such statutes must be available to all members of the general public regardless of religious beliefs. The exemptions or benefits provided under these cases are not analogous to the preference established by the Court of Appeals' decision.

The Free Exercise Clause, which is a bar to government action prohibiting religious freedom, cannot be used to justify a statute which improperly advances religion. In this case, it is the conduct of private, non-governmental entities which is being questioned - conduct beyond the scope of the Free Exercise Clause.

The obvious effects of the Court of Appeals' construction of §701(j), especially in the context of a union dues payment requirement, is to favor certain religious sects over others, and religious employees over the non-religious, by

conferring upon members of such sects the benefits of collective bargaining by unions without the burden of monetary support to the unions for such efforts. Nottelson, upon his reinstatement at Smith, became entitled to wages at the union negotiated rate, insurance coverage, holidays and various other benefits provided through union representation, and Nottelson did not have to contribute to the Union's support in order to maintain and perpetuate these benefits. All other employees, regardless of their wish to support or reject the Union, or their interest in obtaining such benefits, must pay union dues. Clearly Smith may refuse to accommodate employees, no matter how important or sincere their beliefs, when such accommodation is requested on grounds not based in religion.

Under the Court of Appeals' ruling Smith is even required to favor the

interests of particular minority sects over the interests of other religious groups (and nonreligious groups) with respect to requests for weekend time off, to meditate during work hours, to be excused from work early, to be excused from dress code requirements, as well as exemption from collective bargaining contractual provisions.

Analyzing the final part of the Nyquist test, the Court of Appeals summarily concluded there was no entanglement problem because the government is required only to determine whether a belief is religious within the meaning of the statute and whether it is sincerely held. Smith submits that inquiry as to the sincerity of an employee's bona fide religious belief will cause courts to become entangled in internal disputes on matters of religious doctrine. Not only will courts become involved in such

inquiries but the EEOC and employers will be forced to analyze an employee's religious beliefs in order to determine whether §701(j)'s accommodation requirement has been triggered.

Both the Court of Appeals and this Court have strongly supported the view that strict constitutional limitations exist upon the government's authority to determine the rights and responsibilities of private parties where religion is involved. N.L.R.B. v. The Catholic Bishop of Chicago, supra. This Court observed in New York v. Cathedral Academy, 434 U.S. 125, 133-134 (1977): "[T]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."

As noted by Judge Pell in his dissent, the Court of Appeals' abrogation of

its ruling in Catholic Bishop, supra, by imposing on Smith the necessity of accommodating its contractual obligation, work rules and general employment practices to the diverse practices of the many religions to be found among its employees, results in just the unconstitutional entanglement and First Amendment violation which the majority claimed did not exist. The purpose of §701(j) as well as its primary effect is to benefit particular religions or religion generally, and enforcement of that section inevitably leads to impermissible government entanglement with religion.

C. This Court Should Settle The Constitutionality Question Involving Title VII Section 701(j)

A number of decisions have considered the constitutionality of §701(j) in light of the Nyquist test with inconsistent results. These decisions reveal a tortuous and inconclusive path toward resolution of this difficult issue. The

procedural history of these cases dealing with the accommodation requirements of §701(j) reveals repeated appeals and remands resulting in confusion and inconsistent and evasive decisions,[4] all of which point to the need for a resolution of this issue by this Court.

Although there is no conflict among the circuits at the present time, there remain pending a number of cases wherein the constitutionality issue is being litigated, and resolution of the issue by this Court would provide the necessary guidance for courts as well as the EEOC, employers and employees and would eliminate further time-consuming, expensive litigation on this issue in religious discrimination cases.

As explained in detail in earlier sections, the §701(j) accommodation requirement goes far beyond the basic

nondiscrimination requirements of Title VII and actually requires an employer to grant preferential treatment to employees with various religious convictions. While §703(a)(1) requires that employees with religious convictions be placed on an equal footing with other employees by its prohibition against discrimination on religious grounds, §701(j) impermissibly requires employers to place such employees with religious convictions one step above other employees and to grant such employees preferential treatment, solely on the basis of their religious beliefs or practices.

It should be borne in mind that notwithstanding this Court were to find §701(j) unconstitutional, discrimination in employment on the basis of religion would continue to be unlawful under Title VII of the Act. Finding §701(j) constitutionally infirm would not suggest

that employers should be allowed to discriminate against employees based on religion or that employers should not make reasonable accommodation, but only that the government oversteps its constitutional boundaries by imposing a requirement that employers must accommodate religious (but not nonreligious) beliefs and practices.

II. THE SEVENTH CIRCUIT'S HOLDING THAT SMITH FAILED TO MEET ITS OBLIGATION TO ACCOMMODATE NOTTELSON'S RELIGIOUS BELIEFS IS SQUARELY CONTRARY TO THIS COURT'S RULING IN HARDISON AS WELL AS TITLE VII

The Court of Appeals concluded that the District Court did not err in finding that Smith violated Title VII, that a collective bargaining agreement did not of itself provide a defense for Title VII violations and that Trans World Airlines v. Hardison, 432 U.S. 63 (1977) was not to the contrary. (App. A-11). The Court of Appeals conceded that Smith was forced,

due to the Union's refusal to accommodate Nottelson's request for an exemption from payment of his union dues, to choose between two courses of action, each of which involved litigation, costs and consequent penalty. "The choice was between the cost of grievance proceedings and the cost of defending against and satisfying plaintiff's [Nottelson's] Title VII claim." (App. A-12) (emphasis added). For the reasons discussed below, Smith submits that the Court of Appeals' holding is contrary to this Court's decision in Hardison as well as to the provisions of Title VII.

The extent to which either an employer or union must go to meet its burden of proof regarding reasonable accommodation has never been defined by statute. This Court, however, has interpreted §701(j) to require no more than a de minimus cost to the employer; nor can

reasonable accommodation result in unequal treatment of employees on the basis of religion, regardless of whether the discrimination is directed against majorities or minorities, Hardison, supra. Although the facts in Hardison were not precisely the same (being an issue of absence from work for religious reasons rather than non-payment of union dues), the choice faced by TWA was similar. This Court noted that TWA faced a lesser conflict between collective bargaining requirements and Title VII (no other federal statute was involved) and held:

> We agree that neither a collective bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with an otherwise valid agreement. 432 U.S. 63, 79 (footnote omitted).

This Court then interpreted the §701(j) accommodation provision to require no more than a de minimus cost to the

employer. "To require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship." 432 U.S. 63, 84. This Court held that such costs to TWA as higher wages or lost efficiency in other jobs were more than de minimus and therefore constituted an undue hardship for TWA so that it was exempted from the §701(j) accommodation requirement. If such was the standard for determining an undue hardship in Hardison, it was an abrogation of that standard for the Court of Appeals to require that Smith assume the costs of extensive litigation and resulting penalties over what would be a clear violation of the NLRA §8(a)(3) in order to accommodate Nottelson under Title VII.

In Hardison, supra, this Court also cautioned against application of the §701(j) reasonable accommodation standard to result in unequal treatment of em-

ployees on the basis of their religion. Certainly the Court of Appeals has disregarded this element of the case because Smith, under its holding, is required to accommodate Nottelson by waiving a provision of the collective bargaining agreement solely on the basis of Nottelson's religious beliefs. Any other Smith employees who may have equally serious objections to the payment of union dues, whether for personal, moral, political or other reasons, will not be entitled to any such accommodation or special treatment.

Both the Court of Appeals, in Redmond v. G.A.F. Corp., 574 F.2d 897 (1978) and this Court in Hardison, supra, have interpreted the requirements of §701(j) as not mandating that an employer actually carry out an accommodation, so long as that employer fulfills its obligations by proving that any proposed accommodation

would create an undue hardship. Notwithstanding the employer in Hardison, as Smith did in the instant case, indicated its willingness to accommodate the plaintiff's religious beliefs and made efforts toward accommodation of the employee's religious beliefs, this Court never stated that such efforts must be successful in order for §701(j) to be satisfied or that, after accommodation proposals are made and rejected, the employer must make additional efforts to avoid liability under Title VII. Smith has met the standard set by this Court in Hardison by showing that it took all steps possible to achieve an accommodation for Nottelson short of causing itself the undue hardship of litigation for violation of the NLRA §8(a)(3).

In affirming the District Court's holding, the Court of Appeals concluded that Smith had violated Title VII. How-

ever, the District Court ignored, or at least made no findings of fact as to Smith's actions with regard to Nottelson, Smith's willingness to waive the union security clause and Smith's attempts, though unsuccessful, to accommodate Nottelson's religious beliefs or Smith's attempts to persuade the Union to accept Nottelson's suggested accommodation. Notwithstanding the District Court was silent on these points, both the District Court and the Court of Appeals found Smith jointly liable with the Union for failure to accommodate Nottelson's beliefs. Essentially, the lower courts looked only at the evidence pertaining to Nottelson's attempt to reach an accommodation with the Union over the payment of union dues. Moreover, neither the Court of Appeals nor the District Court determined whether the costs to be borne by Smith under the proposed accommodation were de minimus or

more than de minimus. If the costs to Smith under the proposed accommodation were more than de minimus, then this Court's holding in Hardison, supra would permit Smith to assert the undue hardship defense to the proposed accommodation. Accordingly, Smith submits that neither the Court of Appeals nor the District Court followed the appropriate standard set forth in Hardison with respect to Smith.

In support of its conclusion that Smith violated Title VII, the Court of Appeals relies on a very narrow interpretation and reading of Hardison, supra in an attempt to distinguish it from the case at bar and to discredit Smith's claims of undue hardship. The Court of Appeals quotes, out of context, the following clause in an attempt to justify its decision:

> Indeed, the [Supreme] Court expressly stated that "neither a collective

bargaining agreement nor a seniority system may be employed to violate Title VII." (citation omitted) (App. A-11).

In Hardison, this Court qualified that statement with the following clause: ". . .but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with an otherwise valid agreement." 432 U.S. at 79. In the instant case, Smith should not have been required to breach the provisions of its collective bargaining agreement with the Union.

III. THE SEVENTH CIRCUIT'S HOLDING THAT TITLE VII SECTION 701(j) CREATES AN EXCEPTION TO THE NLRA §8(a)(3) SANCTION OF UNION SECURITY CLAUSES IS CONTRARY TO THE INTENT OF CONGRESS, IS BASED ON UNFOUNDED AUTHORITY AND IS INCORRECT

The Court of Appeals held that the union security provisions of the National Labor Relations Act did not relieve an employer or union of the duty of attempting to make reasonable accommodation

to the individual religious needs of its employees. (App. A-8). In construing the relationship between Title VII §701(j) and NLRA §8(a)(3) the Court of Appeals noted that the question of religious accommodation was not addressed by Congress when it was considering enactment of a union security clause in 1947. (App. A-7). There is also no evidence of record that Congress in passing §701(j) in 1972 intended to carve out a "religious objector" exception to §8(a)(3)'s union security requirement. The Court of Appeals attempted to resolve such lack of Congressional expression on the matter by ruling that the later statute implied an exception to the earlier, (App. A-7 and A-8) citing as authority the unfounded and erroneous Sixth Circuit opinion in McDaniel v. Essex International, 571 F.2d 338 (1978).

It has been well settled that union

and management enforcement of a statutorily authorized union security provision against an individual who is seeking, on religious grounds, to be exempted from the obligation to pay union dues does not violate the Free Exercise Clause of the First Amendment to the Constitution.[5] Given the numerous times conflicts between some religions and the union security provisions of §8(a)(3) have been resolved by the federal courts of appeal in favor of supporting the principle of the union shop, as opposed to various persons' religious objections to paying dues, it is clear that §8(a)(3) is supported by strong precedent.

In light of such support, if §701(j) is to be construed as providing an exception to the statutory authorization for union security provisions, there must be some clear indication from Congress that it intended §701(j) to amend §8(a)(3) in

that fashion. This Court has repeatedly emphasized that "No changes of law or policy are to be presumed. . .unless an intent to make such changes is clearly expressed." Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1952). See also Muniz v. Hoffman, 422 U.S. 454, 470 (1975); United States v. Ryder, 110 U.S. 729, 740 (1884). Similarly, this Court has held that it is a "cardinal rule" of construction that "repeals by implication are not favored." Morton v. Mancari, 417 U.S. 535, 549 (1974), and cases cited therein.

The legislative history of §701(j), however, provides no indication that such section was to have any effect on the union security proviso of §8(a)(3), or that the problem of religious objections to payment of dues was even mentioned or considered. The only cases discussed or included in the legislative history of

§701(j) involved Sabbatarians who sought accommodation with regard to their work schedules. (See App. C). It is noteworthy that as late as March 30, 1972, after the March 24, 1972 passage of §701(j), the EEOC's position on this issue was that "a union shop was not unlawful" and that a "Charging Party's refusal [to pay dues] on religious grounds is protected by neither Title VII nor the First Amendment." Sixth Annual Report, Equal Employment Opportunity Commission, p.12 (1972).

Equally significant are the facts that: (1) from 1972 to late 1980, all the many attempts to provide a broad "religious objector" exemption to the NLRA's agency shop provisions failed;[6] and (2) when it included a limited religion-based dues exemption in the 1974 non-profit hospital amendments to the NLRA, Congress did not indicate in any way that Title VII

or §701(j) already provided such an exemption with regard to hospitals or any other employer;[7] and (3) Congress finally passed, in late 1980, a broad religious objector exemption amendment to the NLRA §8(a)(3) thus making it clear that Congress itself did not view Title VII §701(j) as having the effect of creating such an exemption, H.R. 4774, (PL 96-593).

In Hardison, supra, this Court stated, in response to contentions that the duty to accommodate "takes precedent over both the collective bargaining contract and the seniority rights of TWA's other employees:"

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. 432 U.S. 63, 79.

The Court's reasoning is just as applicable to contractual union security provisions, which are specifically authorized by federal statute, and are, except in right-to-work states, virtually "universal." As discussed above, the legislative history of §701(j) contains no "clear and express indication" that Congress intended it to provide a religious-based exception to union security. It is therefore also apparent that the sole case upon which the Court of Appeals relied in holding that Congress so intended, McDaniel, supra is in error. McDaniel, in fact, cited Cooper v. General Dynamics, Convair Aerospace Div., 533 F.2d 163, 169-170 (5th Cir 1976), cert. denied, 433 U.S. 908 (1977), as its sole authority for the proposition that §701(j) does provide a religious exemption to union security. However, a thorough reading of

the Cooper holding will reveal that the 5th Circuit fabricated its ruling on that issue through syntactical analysis, citing no competent authority in its support. It is clear that holdings in Cooper and its progeny, McDaniel; Anderson v. General Dynamics, supra; Tooley v. Martin-Marietta Corp., supra, must fall when confronted by the record of the Congressional debate with respect to the purpose and scope of §701(j).

It is well established that the significant labor peace policy goals supporting the NLRA union security provisos prevail over a religion-based claim for exemption from the union dues obligation. There is no clear authority that holds otherwise. As the Court of Appeals stated previously, with respect to construction of a statute:

> If resort to legislative history is had, the statements of those who supported the legislation and secured its passage will be accepted in

determining its meaning. Union Starch & Refining Co. v. National Labor Relations Board, 186 F.2d 1008 (1951).

This Court's acceptance of the statements of those who secured the passage of §701(j) would require a reversal of the Court of Appeals' holding as to the priority of §701(j) over the union security clause provisions, and a finding that NLRA §8(a)(3) constituted an exemption from the duty to accommodate religious beliefs imposed by Title VII.

IV. THE SEVENTH CIRCUIT'S HOLDING WITH RESPECT TO THE AWARD OF ATTORNEY'S FEES TO NOTTELSON WAS ERRONEOUS

In reviewing the propriety of the award of attorney's fees to Nottelson, the Court of Appeals concluded that such award was proper and whatever Nottelson elected to do with the funds was his own business (App. A-17). Smith submits that the award of attorneys' fees to Nottelson on such basis, in view of the unusual cir-

cumstances in the litigation of this matter, was improper.

Nottelson's attorney indicated that the cost of attorneys' fees involved in this litigation were borne solely by the Seventh-day Adventist Church. The church retained Nottelson's attorney and paid for legal services rendered on Nottelson's behalf. Nottelson has borne none and will continue to bear none of the costs associated with his legal representation in this matter. Moreover, Smith and the Union were informed by Nottelson's attorney that any attorneys' fees awarded to Nottelson would be remitted to the church pursuant to an arrangement Nottelson's attorney has with the church. An award of attorneys' fees under these circumstances was an abuse of discretion.

The Seventh-day Adventist Church has engaged in various legislative efforts to advance its basic tenet (that church

members not join or financially support labor unions) through amendment to Title VII of the Civil Rights Act as well as financed this litigation. As such, the church has a real and direct interest in the outcome of this litigation. To award attorneys' fees under these circumstances, especially where the church will be reimbursed by Smith and the Union in this matter violates the principle set forth in Nyquist, supra, and constitutes an establishment of religion. Certainly the church's intent to finance this litigation cannot be construed to be a secular purpose. Although the church has every right to expend church funds for what it perceives to be a legitimate church objective, neither Smith nor the Union should be required to subsidize this effort through the payment of attorneys' fees.

In Sprogis v. United Air Lines, 517

F.2d 387 (7th Cir 1975) the Court of Appeals affirmed the denial of attorneys' fees to a successful Title VII litigant, taking note that another organization had assumed the full financial burden for providing legal services to the plaintiff. The court stated: "Although attorneys' fees have been granted in cases with organization sponsorship they are not awarded without regard to the underlying circumstances of the case." (emphasis added). The role of the Seventh-day Adventist Church in financing this litigation is quite different than the interest of "public interest organizations which typically represent parties in civil suits. . . ." Sprogis, supra. The Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 718 (5th Cir 1974) cautioned: "In no event, however, should the litigant be awarded a fee greater than he is contractually bound to

pay, if indeed the attorneys have contracted as to amount." In a recent case, National Treasury Employees Union v. United States Department of the Treasury, CA DC, Slip Op. No. 78-1085, June 19, 1981, the Court of Appeals for the District of Columbia held that a union whose salaried attorneys render legal services for which they are entitled to court-awarded fees from the federal government may recover only the value of expenses incurred, not market value fees. Otherwise the union could turn a windfall profit on the services of its attorneys. Smith submits the Court of Appeals erred in failing to closely analyze the arrangement under which the Seventh-day Adventist Church retained and compensated Nottelson's attorney.

Conclusion

For all of the reasons set forth herein Smith submits that the Court should

grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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July 15, 1981

FOOTNOTES

1 Page citations to the materials contained in the appendices to this Petition are to the pages of the respective appendices.

2 The legislative debate appears as Appendix C of this Petition.

3 Sherbert v. Verner, 374 U.S. 398 (1963), Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970), and recently Thomas v. Review Board of the Indiana Unemployment Security Division, _____ U.S. _____ (1981).

4 Constitutionality of §701(j) upheld in: Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), affirmed by equally divided Supreme Court, 429 U.S. 65 (1976); Tooley v. Martin Marietta Corp., 476 F.Supp. 1027 1979, affirmed No. 80-3029, Slip op., _____ F.2d _____ (9th Cir. 1981); Jordan v. North Carolina Nat'l. Bank, 399 F.Supp. 172 (W.D. N.Car. 1975); Anderson v. General Dynamics Convair Aerospace Div., 489 F.Supp. 782 (S.D. Cal. 1980), reversed No. 80-5373, Slip op., _____ F.2d _____ (9th Cir. 1981); Burns v. Southern Pacific Transportation Co., 389 F.2d 403 (9th Cir. 1979), rem'd 22 FEP 1229; McDaniel v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978).

§701(j) found unconstitutional in: Cummins v. Parker Seal Co., 516 F.2d 544, 554 (6th Cir. 1975) (Celebrezze dissenting); Anderson v. General Dynamics Convair Aerospace Div., 489 F.Supp. 782 (S.D. Cal. 1980); Gavin v. Peoples Natural Gas, 464 F.Supp. 622 (W.D. Pa. 1979); Yott v. North American

Rockwell Corp., 428 F.Supp. 763 (C.D. Cal. 1977); Issac v. Butler's Shoe Corp., 25 FEP Cases 828 (N.D. Ga. 1980).

5 Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2nd Cir.), cert. denied, 419 U.S. 1093 (1974); Hammond v. United Papermakers and Paperworkers Union, 462 F.2d 174 (6th Cir.), cert. denied, 409 U.S. 1028 (1972); Linscott v. Millers Falls Co., 316 F.Supp. 1369 (D. Mass. 1970), aff'd 440 F.2d 14 (1st Cir.), cert. denied, 404 U.S. 872 (1971); Gray v. Gulf, Mobile & Ohio Railroad Co., 429 F.2d 1064, 1071-1072 (5th Cir. 1970), cert. denied, 400 U.S. 1001 (1972); Railway Employees Department v. Hanson, 351 U.S. 225 (1956).

6 See discussion in Yott v. North American Rockwell, 501 F.2d 398, 400, n.4 (9th Cir. 1974), and S. 2109, 93rd Cong., 1st Sess. (1973); H.R. 16541, 93rd Cong., 2nd Sess. (1974); H.R. 1528, 94th Cong., 1st Sess. (1975); H.R. 14911, 94th Cong., 2nd Sess. (1976); H.R. 14913, 94th Cong., 2nd Sess. (1976); H.R. 14916, 94th Cong., 2nd Sess. (1976); H.R. 14920, 94th Cong., 2nd Sess. (1976); H.R. 352, 95th Cong., 1st Sess. (1977); H.R. 9009, 95th Cong., 1st Sess. (1977); H.R. 9113 95th Cong., 1st Sess. (1977); H.R. 9368, 95th Cong., 1st Sess. (1977); H.R. 9596, 95th Cong., 1st Sess. (1977); S. 2239, 95th Cong., 1st Sess. (1977); S. 1693, 96th Cong., 1st Sess. (1979) H.R. 4774, 96th Cong., 1st Sess. (1979).

7 See the discussion of this issue by Judge Rives in this dissent in Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163, 175-177 (1976).

APPENDIX A

Opinion of the United States Court of Appeals for the Seventh Circuit, Nottelson and EEOC v. Smith Steel Workers and A. O. Smith Corporation 643 F.2d 445 (7th Cir. 1981)

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1678 and 80-1705

DARREL C. NOTTELSON,

Plaintiff-Appellee,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Intervenor-Appellee,

v.

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO, and A. O. SMITH CORPORATION,

Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 75-C-220—Robert W. Warren, *Judge.*

ARGUED OCTOBER 27, 1980—DECIDED FEBRUARY 27, 1981

Before SWYGERT, CUMMINGS, and PELL, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Plaintiff Darrel C. Nottelson brought this action against his employer, defendant A. O. Smith Corporation (Smith), and his union, defendant Smith Steel Workers D.A.L.U.[1] 19806, AFL-CIO (Union), under 42 U.S.C. § 2000e-5(f)(1) and (3), alleging *inter alia* that defendants had discriminated against plaintiff because of his religion in violation of

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[1] Directly Affiliated Local Union.

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e *et seq.*), in that they failed "reasonably to accommodate" within the meaning of Section 701(j) of that Act (42 U.S.C. § 2000e(j), note 4 *infra*) to plaintiff's religious objection to the payment of union dues. The district court ruled in favor of plaintiff on this claim with respect to both defendants and they have appealed. We affirm with one slight modification of the computation of damages.

I. *Introduction*

Plaintiff, a resident of Menominee Falls, Wisconsin, was a production worker at Smith from October 30, 1947, to July 11, 1975, and a member of the Union from October 30, 1947, to April 15, 1975. The Union is the exclusive bargaining agent for the collective bargaining unit in which plaintiff was employed, and the collective bargaining agreement between Smith and the Union contains a union security clause requiring membership in the Union as a condition of continued employment with Smith.

In May 1966, plaintiff joined the Seventh-day Adventist Church, which teaches that it is morally wrong to be a member of or pay dues to a labor organization. In December 1974, plaintiff informed the Union that he could no longer in good conscience support it financially because of his religious convictions and requested the Union to accommodate his religious objection to the payment of union dues by permitting him to pay an equivalent sum to a non-religious, non-union charity. He ceased paying his dues on January 1, 1975, and to show his good faith began making contributions to the American Cancer Society. The Union refused the requested accommodation and in March 1975 notified plaintiff that he would have to pay his delinquent dues or be discharged from Smith pursuant to the union security clause in the collective bargaining agreement. Smith indicated that it was willing to make an accommodation but not without the Union's approval. Plaintiff thereupon filed a charge of unlawful employment practices with the Equal Employment Opportuni-

ty Commission (EEOC) office in Milwaukee, Wisconsin, and the EEOC referred the matter to the appropriate Wisconsin agency on April 2.

On April 15, the Union expelled plaintiff from its membership for failure to pay dues, and on April 17 informed him that he would be discharged. On April 23, plaintiff initiated the present litigation, seeking temporary and preliminary injunctive relief pending final disposition of the charges filed with the EEOC. Smith discharged plaintiff on April 24. On April 30, Judge Warren issued a temporary restraining order which, with extensions, restored plaintiff to his job until July 10. On that date, Judge Warren dismissed the action for want of a present EEOC right-to-sue letter to plaintiff, without prejudice to reinstatement upon receipt of such a letter. 397 F.Supp. 928.

The Union again insisted on plaintiff's discharge and Smith complied, informing plaintiff not to come to work on July 11. He has not returned to employment at Smith since that date. Smith also refused, because of the Union's contractual objection, to defer plaintiff's termination until his six weeks' vacation time was used but did pay him for that period. The EEOC issued plaintiff a right-to-sue letter on July 21, and on October 29, plaintiff filed his second amended and supplemental complaint against defendants pursuant to an October 22 order granting his July 22 motion for leave to do so.

In Count I Smith and the Union were alleged to have discriminated against plaintiff because of his religion in violation of Sections 703(a)(1)[2] and 703(c)(1)[3] of the Civil

[2] Section 703(a)(1) (42 U.S.C. § 2000e-2(a)(1)) provides in pertinent part that it shall be an unlawful employment practice for an employer

> "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual * * * because of such individual's * * * religion * * *."

[3] Section 703(c)(1) (42 U.S.C. § 2000e-2(c)(1)) provides in pertinent part that it shall be an unlawful employment practice for a labor organization

(Footnote continued on following page)

Rights Act of 1964 respectively in that they had failed to show that they could not reasonably accommodate plaintiff's religious observance "without undue hardship" as required by Section 701(j)[4] of the Act. The Union was also alleged to have violated 703(c)(3)[5] of the Act by enforcing the union security provision of the collective bargaining agreement so as to cause Smith to discriminate against plaintiff on the basis of religion. Plaintiff therefore sought reinstatement, actual damages of $50,000, exemplary damages of $100,000 and reasonable attorney's fees (then supposedly amounting to $10,000).

In Count II, plaintiff sought identical relief, alleging that the union security clause of the collective bargaining agreement had been enforced under the sanction of the National Labor Relations Act (NLRA) in contravention of the First, Fourth, Ninth, and Fourteenth Amend-

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[3] *continued*

"to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his * * * religion. * * *."

[4] Section 701(j) (42 U.S.C. § 2000e(j)) provides:

"The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Although the undue hardship defense is made expressly available only to "employers," it has been held to apply to unions as well. See *e.g., Yott v. North American Rockwell Corp.*, 602 F.2d 904, 909 (9th Cir. 1979); *McDaniel v. Essex International*, 571 F.2d 338, 344 (6th Cir. 1978). The parties here do not contend that Judge Warren erred in so holding in this case (481 F.Supp. at 479), and we note that if the Section were construed otherwise, unions would be armed with an appealing equal protection claim.

[5] Section 703(c)(3) (42 U.S.C. § 2000e(c)(3)) provides in pertinent part that it shall be an unlawful employment practice for a labor organization

"to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

ments.[6] Sections 8(a)(3) and 8(b)(2) of the NLRA (29 U.S.C. §§ 158(a)(3) and 158(b)(2)) recognize the validity of union security clauses and the concomitant right of a union to demand discharge of an employee for failure to pay dues.

The Union in its responsive pleadings and at trial took the position that enforcement of the union security clause against plaintiff was protected under the NLRA and therefore did not violate Title VII and that Title VII's Section 701(j), as sought to be applied, violated the Establishment Clause of the First Amendment. Smith asserted the affirmative defense of undue hardship, claiming that it had done all it could to accommodate plaintiff without causing the Union to initiate arbitration proceedings to enforce the union security clause and to file an unfair labor practice charge to the same effect under the NLRA.

The district court's findings of fact and conclusions of law are contained in three memorandum opinions reported at 423 F.Supp. 1345, 481 F.Supp. 756, and 489 F.Supp. 94. Judge Warren held first, in denying the Union's motion to dismiss Counts I and II, that the union security provision was not a defense to the Title VII claim. 423 F.Supp. at 1347-1348. Subsequently, he reaffirmed and clarified this ruling in response to defendants' post-trial motion for reconsideration, holding that the anti-discrimination provisions of Title VII take priority over the pro-union security clause provisions of the NLRA. 489 F.Supp. at 96-97. Following the trial, Judge Warren entered his findings that defendants could have accommodated plaintiff's charity-substitute proposal without undue hardship and that they had therefore violated Title VII by failing to do so. 481 F.Supp. at 759-760. He also held, in denying defendants' motion to reconsider, that Section 701(j) does not violate the Establishment

[6] Pendent Count III arose under the Wisconsin Constitution and was dismissed by the district court on December 20, 1976, on the ground that a state court would be the more appropriate forum for its resolution. 423 F.Supp. at 1348. That ruling is not involved in this appeal.

Clause. 489 F.Supp. at 97-98. He declined to decide the constitutional questions raised by plaintiff in Count II of the amended and supplemental complaint because plaintiff had been afforded complete relief on the statutory claim set forth in Count I. 489 F.Supp. at 97.[7]

The final judgment, entered on April 18, 1980, awarded plaintiff back pay, attorney's fees and costs, to be borne equally by Smith and the Union. Smith was ordered to reinstate plaintiff no later than April 28, 1980; plaintiff was ordered to contribute to a non-religious charity to be agreed upon by plaintiff and the Union "an amount equal to the union dues he would have owed had he continued to work at Smith during the relevant period;" and the Union was enjoined from interfering with the judgment by filing a grievance with the National Labor Relations Board. 489 F.Supp. at 98-99.

The Union and Smith filed notices of appeal on May 9 and 15 respectively, and the cases, docketed here as Nos. 80-1678 and 80-1705 respectively, were consolidated by this Court pursuant to motions by the parties. On June 19, we granted leave to the EEOC to intervene on plaintiff's behalf.

II. *The Duty to Accommodate*

It is undisputed that Title VII requires unions and employers to make a reasonable accommodation of an employee's religiously motivated conduct or to show that to do so would work an undue hardship. Smith concedes that it was so required in this case. The Union, however, has adamantly maintained from the outset of the events leading to this litigation that Title VII is preempted

[7] One of the claims by defendants in this appeal is that the district court erred or abused its discretion in failing to dismiss Count II. Because we agree with the district court that complete relief is afforded plaintiff under Title VII, we find no abuse of discretion and decline to exercise our plenary authority to reach the merits of plaintiff's constitutional claim.

here by the NLRA. As noted, Sections 8(a)(3) and 8(b)(2) of the NLRA permit an employee in a union shop to be discharged for failure to pay union dues. The thrust of the Union's position is that these provisions represent a Congressional determination of the balance to be struck between the national policy of promoting labor peace and the national policy protecting the religious needs of individual employees and therefore constitute an exemption from duty to accommodate otherwise imposed by Title VII.

The district court rejected this argument and held that to the contrary Title VII creates an exception to the NLRA's sanction of union security clauses. 489 F.Supp. at 96-97. We agree. As the Sixth Circuit concluded after extensive discussion of this issue, "[t]here is no indication in the text or legislative history of [the NLRA] that Congress intended either subsection 8(a)(3) or 8(b)(2) to strike a balance between the religious needs of individual employees and the security requirements of unions." *McDaniel v. Essex International*, 571 F.2d 338, 342 (6th Cir. 1978). The compromise intended was "between the abuses of compulsory unionism and the problem of 'free-riders'." *Id.*; see also *National Labor Relations Board v. General Motors Corp.*, 373 U.S. 734, 740. To that end, "[t]he closed shop was outlawed; the union shop was permitted, with the limitation that a union could require an employer to discharge an employee only for failure to pay dues." *McDaniel, supra*, at 342. The question of religious accommodation simply was not addressed when Congress was considering the enactment of Sections 8(a)(3) and 8(b)(2). *McDaniel, supra* at 343.

In addition, the Union's claim that the NLRA established an overriding policy favoring union security provisions is belied by the fact that such provisions are unenforceable in states where state law is to the contrary. 29 U.S.C. § 164(b); *Retail Clerks v. Schermerhorn*, 373 U.S. 746. Indeed, they have recently been held subordinate to state statutes requiring a charity-substitute accommodation like the one in issue here for religious objectors. *Lumber Workers Local 2362 v. Wondzell*, 601 P.2d 584 (Alaska Sup. Ct. 1979), appeal

dismissed for want of a substantial federal question, 444 U.S. 1040. Moreover, there is "no national [labor] policy of higher priority than the elimination of discrimination in employment practices." *McDaniel, supra* at 343; see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47.

Title VII does not itself provide an exemption for unintentional discrimination resulting from the enforcement of union security clauses as it does, for example, for unintentional discrimination resulting from the implementation of a bona fide seniority or merit system. See 29 U.S.C. § 2000e-2(h); *Trans World Airlines v. Hardison*, 432 U.S. 63, 81-82. Given the absence of such an express exemption and the complete lack of evidence that Congress intended the courts to imply such an exemption from the NLRA, we join with the Fifth, Sixth and Ninth Circuits in holding that the union security provisions of the NLRA "do not relieve an employer or a union of the duty of attempting to make reasonable accommodation to the individual religious needs of employees." *McDaniel, supra* at 343. Accord, *Yott v. North American Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978), certiorari denied, 439 U.S. 1072; *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978), certiorari denied *sub nom. International Association of Machinists and Aerospace Workers of America v. Anderson*, 442 U.S. 921; *Cooper v. General Dynamics, Convair Aerospace Div.*, 533 F.2d 163 (5th Cir. 1976), certiorari denied *sub nom. International Association of Machinists and Aerospace Workers v. Hopkins*, 433 U.S. 908.

III. *Undue Hardship*

A. The Union

The Union argues alternatively that the district court erred in finding that it could have accommodated plaintiff's charity-substitute proposal without undue hardship. At the outset, we reject the Union's claim that the district court applied the wrong legal standard. "Undue hardship" has been determined by the Supreme

Court to exist only where the cost imposed is more than "*de minimis.*" *Trans World Airlines v. Hardison*, 432 U.S. 63, 84. The rationale underlying this determination is that anything more than a *de minimis* cost would result in discrimination against other employees, a result the Court concluded Congress did not intend. The district court plainly applied the *Hardison* standard, finding that the charity-substitute accommodation would impose "only a *de minimis* cost" on the Union (481 F.Supp. at 759) and "would not increase the amount or severity of duties required of [plaintiff's] co-workers" (481 F.Supp. at 760).

We also reject the Union's contention that the district court's findings were erroneous because the failure of any individual to pay union dues in a union shop is as a matter of law "always above *de minimis*" in that other workers must pay more than their fair share of the costs of union representation. Because a religious objector under a charity-substitute accommodation bears the same financial burden as his co-workers, he is not, as the Union suggests, a "free rider" seeking something for nothing, and the diversion of his contribution to a charity rather than the Union does not of itself make the accommodation unfair or unreasonable as a matter of law. See *McDaniel, supra*, 571 F.2d at 343; *Burns v. Southern Pacific Transportation, supra*, 589 F.2d at 406-407; *Anderson v. General Dynamics, supra*, 589 F.2d at 401-402.

As this Court has already made clear, the determination of whether an accommodation can be made without undue hardship is an issue of fact and will not be set aside unless clearly erroneous. *Redmond v. GAF Corp.*, 574 F.2d 897, 902-903 (7th Cir. 1978). Here the district court's findings are amply supported by the record.

The Secretary-Treasurer of the Union testified that the Union would not be financially injured by the loss of plaintiff's dues, which represented only .02% of the Union's annual budget. The Union presented no evidence that the loss of receipts from plaintiff would necessitate an increase in the dues of his co-workers, and even if such an increase were necessary it would amount

only to 2.4 cents per year per employee. In *Burns v. Southern Pacific Transportation Co., supra*, the Ninth Circuit in a case virtually identical to this one held that an increase of 24 cents per year was *de minimis*. 589 F.2d at 407.

There was also no evidence presented that other workers would seek similar accommodations or that the accommodation would lead to labor strife. The Union President admitted that his fear of a "steamroller effect" was purely conjectural and that no other employee had sought such an accommodation. He also admitted that he knew of no harm suffered by a union that had permitted such accommodations, that he had made no effort to contact the officials of any union that had permitted such an accommodation, and that he was aware that the charity-substitute has been officially adopted by the Executive Council of the AFL-CIO (see Joint App. at 430) as an appropriate accommodation of individual religious needs.

The burden of making a reasonable accommodation or proving undue hardship was on the Union. *Anderson v. General Dynamics, supra*, 589 F.2d at 401. The record shows that the Union in fact flatly refused to make any accommodation[8] and at trial failed to present any evidence of undue hardship. The district court's finding that the Union had violated Title VII by causing Smith to discharge plaintiff because of his religious objection to the payment of dues was therefore not erroneous.

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[8] The Union claims to have made an attempted accommodation by offering to permit plaintiff to withdraw from union membership and continue working at Smith if he paid to the Union a service fee equivalent to his dues. In view of the fact that plaintiff's religious objection is to providing financial support to a labor organization, the proposal can hardly be deemed an accommodation, much less reasonable. See *Burns v. Southern Pacific Transportation Co., supra*, 589 F.2d at 406. Indeed, the Union did not suggest this "accommodation" or even bother to answer plaintiff's December 1974 request for an accommodation until May 1975, two weeks after plaintiff had filed this lawsuit.

B. Smith

We also conclude that the district court did not err in finding that Smith had violated Title VII. Smith has never disputed the reasonableness of the charity-substitute accommodation itself; its claim is that it could not unilaterally accept this accommodation in disregard of the union security clause in its collective bargaining agreement with the Union. It is well settled, however, that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations. See *Robinson v. Lorillard*, 444 F.2d 791, 799 (5th Cir. 1971); cf. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51.

Trans World Airlines v. Hardison, *supra*, on which Smith relies, is not to the contrary. TWA was found not to have violated Title VII in that case because accommodation of the plaintiff's religious objection to working on Saturdays would have required abrogation of the rights of other employees under a bona fide seniority system protected not only under the collective bargaining agreement but under Title VII itself. The Court held only that Congress did not intend such an accommodation, not that compliance with a collective bargaining agreement was a defense to an allegation of employer discrimination. Indeed, the Court expressly stated that "neither a collective bargaining agreement nor a seniority system may be employed to violate Title VII." 432 U.S. at 79.

In addition, Smith's position is foreclosed by the statute itself. Section 703(c)(3) makes it unlawful for a union "to cause an employer to discriminate against an individual *in violation of this section*," thus plainly contemplating that both employer and union would be culpable where the employer accedes to a union's unlawful demand for discriminatory action.

It is true, of course, that Smith was caught between a rock and a hard place. The choice was not, however, as Smith would have it, between a no-cost compliance with

the Union's demands and the cost of defending itself against the Union in grievance proceedings. The choice was between the cost of grievance proceedings and the cost of defending against and satisfying plaintiff's Title VII claim. The district court recognized that "undergoing grievance proceedings may have cost Smith something," but concluded that Smith "could have lessened its exposure" and protected plaintiff in compliance with Title VII by not acceding to the Union's demand (489 F.Supp. at 98). Smith does not claim otherwise, but relies on the argument that Congress did not intend an employer to accommodate religion in disregard of collective bargaining agreements. For the reasons discussed above, we cannot accept that defense in this case and therefore affirm the district court's finding that Smith violated Title VII.[9]

IV. *The Constitutionality of Section 701(j)*

Smith and the Union claim that Section 701(j) violates the First Amendment's command that "Congress shall make no law respecting an establishment of religion * * *" We are inclined to agree with the EEOC that we are bound on this issue by the holding in *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852 (1979). In that case, the California Supreme Court adopted the language of Section 701(j) to interpret a state constitutional provision outlawing employment discrimination as forbidding "disqualification of employees for religious practices unless un-

[9] Plaintiff also claimed that Smith violated Title VII independently by refusing to consider him for a non-union supervisory position. The district court made no findings with respect to this question. The Union argues here in its own defense that the district court should have found Smith liable on that ground and that the Union's refusal to accept the charity-substitute was not the precipitating cause of plaintiff's discharge. Even assuming, however, that Smith committed two independent violations of Title VII, that would not relieve the Union of its liability for failure to accommodate. Therefore, we need not reach the question whether there was a second violation.

reasonable accommodation by the employer is impossible without undue hardship," 24 Cal.3d at 174, and then held that the provision, so interpreted, did not violate the Establishment Clause. The Supreme Court dismissed the appeal, taken under 28 U.S.C. § 1257(2), for want of a substantial federal question. 444 U.S. 986. This, of course, is a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 343-344.

The Union attempts to distinguish *Rankins* on the ground that it involved a religious objection to working on certain holy days whereas this case involves a religious objection to union dues. We think this is a distinction without substance. The question in both cases is whether a legislative mandate requiring reasonable accommodation of religious conduct (short of undue hardship) offends the First Amendment. Once it has been determined as a factual matter that an accommodation is reasonable, the nature of the underlying religious objection becomes irrelevant.

Assuming, however, that we are not bound by *Rankins*, we reach the same conclusion under the three-part test enunciated by the Supreme Court for determining whether a statute is permissible under the Establishment Clause. That test provides:

> "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion * * *; finally, the statute must not foster 'an excessive government entanglement with religion'" [quoting *Walz v. Tax Commission*, 397 U.S. 664, 674]. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (citations omitted).[10]

The purpose of Title VII's anti-discrimination provisions is "to achieve equality of employment opportuni-

[10] Although this test was originally developed in the context of cases involving the expenditure of public funds, *e.g.*, *Lemon v. Kurtzman*, *supra*, the Supreme Court has recently applied it in a case not involving such an expenditure, *Stone v. Graham*, ... U.S. ....., 49 L.W. 3369 (*per curiam*), and therefore this test appears to be governing here as well.

ties." *Griggs v. Duke Power Co.*, 401 U.S. 424, 429; see also *Trans World Airlines v. Hardison*, *supra*, 432 U.S. at 85. Section 701(j), by prohibiting unreasonable refusal to accommodate religiously motivated conduct and practices as well as beliefs, is plainly intended to protect the employment opportunities not only of the victims of overt discrimination but also of individuals who are unintentionally discriminated against because their religious convictions are not reflected in facially neutral majoritarian rules. Cf. *Griggs*, *supra*, 401 U.S. at 431. This is a secular purpose. Section 701(j) is also plainly intended to relieve individuals of the burden of choosing between their jobs and their religious convictions where such relief will not unduly burden others. This is also a secular purpose, part of "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States v. Macintosh*, 283 U.S. 605, 634 (Hughes, C.J., *dissenting*); see *Abington School District v. Schempp*, 374 U.S. 203, 294-299 (Brennan, J., *concurring*).[11]

Application of Section 701(j) does not, as defendants contend, have a primary effect of advancing the interests of religionists over non-religionists or the beliefs of one sect over those of another. Like the statutory exemption to military service for conscientious objectors, it requires no particular sectarian affiliation

[11] Defendants argue that Section 701(j) has a non-secular purpose, relying solely on the allegedly impermissible motive of Senator Jennings Randolph, principal sponsor of the Section, in promoting its adoption. While it is true that Senator Randolph expressed some concern for the future viability of his own and other Sabbatarian sects in the absence of an accommodation provision, 118 Cong. Rec. 705 (1972), he also expressed concern for the individuals of all minority religions who are forced to choose between their religion and their livelihood and proposed the provision "in the spirit of religious freedom." 118 Cong. Rec. at 705-706. Even assuming, however, that Senator Randolph had an impermissible motive in addition to a secular motive, the statute would not be rendered invalid under the Establishment Clause because it states a valid secular purpose on its face. See, *e.g.*, *Palmer v. Thompson*, 403 U.S. 217.

or theological position and promotes only "the principal of supremacy of conscience." *Gillette v. United States*, 401 U.S. 437, 453.[12] It does not confer a benefit on those accommodated, but rather relieves those individuals of a special burden that others do not suffer by permitting them to fulfill their societal obligations in a different manner, as in this case by substituting a charitable contribution for union dues. Such accommodations have generally been held compatible with the Establishment Clause. See, *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 234-236; *Zorach v. Clauson*, 343 U.S. 306, 314, *Sherbert v. Verner*, 374 U.S. 398, 409. The fact that some religions may have more or different kinds of religiously dictated observances than other religions does not invalidate a law that applies to all faiths equally.

Nor does Section 701(j) foster "an excessive government entanglement with religion" under the third branch of the *Lemon* test, *supra*. The government is required only to determine whether a belief is "religious" within the meaning of the statute (see note 12 *supra*) and whether it is sincerely held, a question of credibility. This is essentially the same determination required in implementing the conscientious objector exemption under the selective service statutes and does not render Section 701(j) invalid.

Finally, we note that when an individual is exempted from military service as a conscientious objector, another individual must go in his place. The cost to the second individual might very well include injury or

[12] The EEOC has consistently interpreted the term "religious" in relevant provisions of Title VII as having the same broad meaning as the term has as used in the religious exemption provision in the selective service statutes. See CD 76-104 (1976), CCH Emp. Prac. ¶6500; CD 72-1301 (1972), CCH EEOC Dec. ¶6338; CD 71-2620 (1971), CCH EEOC Dec. ¶6283; CD 71-779 (1970), CCH EEOC Dec. ¶6180. That Congress intended this construction may be inferred from the fact that Section 701(j) was enacted after the Supreme Court defined "religious" in the selective service context in *United States v. Seeger*, 380 U.S. 163, and *Welsh v. United States*, 398 U.S. 333; see *Hecht v. Malley*, 265 U.S. 144, 153.

death and is in any event clearly greater than the *de minimis* cost imposed on others by Section 701(j). Inasmuch as the selective service exemption does not offend the Establishment Clause, see *Gillette, supra*, 401 U.S. at 448-460, it follows necessarily that Section 701(j) on its face and as here applied does not either. See also *Cummins v. Parker Seal Company*, 516 F.2d 544, 551-554 (6th Cir. 1975), affirmed by an equally divided court, 429 U.S. 65, vacated and remanded on another ground, 433 U.S. 903.[13] Accordingly, the district court correctly adopted the holding in *Tooley v. Martin-Marietta Corp.*, 476 F.Supp. 1027, 1030 (D. Ore. 1979), that Section 701(j) "promotes the free exercise of religion without violating the Establishment Clause."

V. *Attorney's Fees and Unemployment Compensation Benefits*

The district court held that plaintiff as the prevailing party was entitled to reasonable attorney's fees, to be paid equally by Smith and the Union, pursuant to Section 706(k) of the Civil Rights Act (42 U.S.C. § 2000e-5(k)). 489 F.Supp. at 99. Subsequently the fees award was set at $12,478 (Supplement to Union's Appendix).[14]

[13] *Cummins*, decided prior to *Trans World Airlines v. Hardison, supra*, held that the employer in that case could have accommodated without undue hardship the plaintiff's religious objection to working on Saturdays. The Supreme Court remanded the case for reconsideration of that holding in light of *Hardison*. On remand, the Sixth Circuit found *Hardison* controlling and affirmed the district court's finding that no accommodation could be achieved without undue hardship, thereby making it unnecessary to reach the constitutional issue. 561 F.2d 658 (1977) (*per curiam*). Judge Phillips' scholarly discussion of the Establishment Clause and Section 701(j) is nevertheless persuasive authority for the position we take here.

[14] The district court's September 18, 1980, memorandum and order, denying the Union's motion to reconsider the award of attorney's fees to plaintiff and setting the fees amount, was not available at the time briefs were filed in this Court. On December 3, 1980, we granted the Union's motion to supplement its appendix by adding that memorandum and order.

Smith and the Union argue that plaintiff is not entitled to attorney's fees because they would be paid over to the Seventh-day Adventist Church, which is said to have used this litigation to advance the tenets of its faith. Requiring defendants to pay fees in this situation, they argue, would violate the Establishment Clause.

At the oral argument in this Court, plaintiff's counsel stated that contrary to defendants' assertion he intended to charge plaintiff for his services. Plaintiff's position is that the district court correctly held that he is a prevailing party entitled to reasonable attorney's fees under Section 706(k) and that whatever he elects to do with the funds subsequently is his own business and cannot violate the First Amendment. We agree, and therefore affirm the district court on this issue as well. See *Anderson v. General Dynamics, supra*, 589 F.2d at 402; *Tooley v. Martin-Marietta Corp., supra*, 476 F. Supp. at 1031.

One final point. In holding defendants jointly liable, Judge Warren reduced the total back pay due plaintiff from defendants by the amount of employment benefits paid him. 489 F.Supp. at 98; J. App. 65. However, the amount of those benefits paid and to be paid should be credited only to Smith, the party who financed them under Wis. Stats. 108.16 and 108.18. Since the Union did not contribute to plaintiff's unemployment compensation account, it should not receive credit for payments to him from that account. Otherwise the judgment below remains unchanged.

Judgment affirmed as modified; costs to plaintiff.[15]

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[15] In affirming, we have considered all points raised by the parties and the three *amici curiae*. Any points not discussed herein have been deemed too frivolous for discussion.

PELL, *Circuit Judge*, dissenting. The First Amendment of our Constitution treats religion in two respects: Congress shall make no law respecting an establishment of religion but, on the other hand, Congress shall make no law prohibiting the free exercise of religion. Each of these prohibitions is a fundamental part of the heritage of this nation. Many of the early settlers came to the colonies for the purpose of engaging in a free exercise of their religious beliefs, but the need for this freedom of exercise often arose because of the repressive alliance between church and state which tolerated no exercise of other or non-approved religious beliefs. Because it appears to me that the majority opinion crosses the boundary of freedom of exercise into an excessive governmental entanglement with religion, I respectfully dissent.

In reaching the conclusion I have, I have essentially agreed with, and would adopt, the reasoning and analysis of Judge Schwartz in *Anderson v. General Dynamics Convair Aerospace Division*, 489 F. Supp. 782 (S.D. Cal. 1980), *appeal docketed*, No. 80-5373 (9th Cir. May 14, 1980).[1] I am not unmindful that that decision has been appealed to the Ninth Circuit and that oral argument was heard in that court on January 15, 1981. Because of my firm conviction that the correct result was reached by the district court in *Anderson*, I will adhere to that position irrespective of the result that may be reached by the Ninth Circuit in reviewing that case. I also see no reason for adding to the analysis of Judge Schwartz. I will therefore confine myself to a few observations directed to the majority opinion in the present case.

That opinion upholds a charity-substitute accommodation as making the religious objector not a "free rider"

[1] The Amicus brief filed in this appeal by the Equal Employment Advisory Council sets forth in some greater detail than does the *Anderson* opinion, the historical background and argument supporting the position reached in *Anderson*, and fortifies my conclusion as to the correctness of the result reached in *Anderson*.

seeking something for nothing, and opines that the diversion of his contribution to a charity rather than the Union does not make the accommodation unfair or unreasonable. The Union, however, by law is the legal representative of all employees in the Smith unit and it is required to represent all of such employees without discrimination. Further, by a legally valid contract, the Union is entitled to have all employees in the unit contribute their proportionate share of the cost of that representation. The fact should not be significant that by paying over to a charity an amount equivalent to dues Nottelson expends the same amount of money as does another employee who may not be in favor of the Union representing him but who cannot fall back upon a claimed religious tenet. The merchant who sells merchandise, or the lawyer who sells service, would scarcely regard that he was receiving a quid pro quo to which he was entitled if the price or the fee was instead paid over to a charity no matter how worthwhile or deserving that other recipient might be. No more, it seems to me, should Nottelson be entitled to the services without paying for them in the same manner as his fellow employees. In sum, he is a "free rider," plain and simple.

Referring to the substitution of a charitable contribution for the payment of union dues, where the payment is required for the retention of employment status, as fulfilling "societal obligations" strikes me as indulging in noetic perjinkities divorced from realism. Nor do I think that we can adopt the pragmatic analysis that the loss of a particular payment of dues involves only a very small amount of money. While undoubtedly the Seventh-Day Adventist Church is not the largest denomination in this country, it equally undoubtedly includes a substantial number of people among its adherents. Assuming that Nottelson is relying on a basic tenet of his religion, the result in this test case, litigated by his Church, cannot but have a substantial impact in industrial situations similar to that here involved. We cannot philodoxically avoid the fact of entanglement by simplistically ordaining that Section 701(j) does not have a primary effect of advancing the beliefs of one sect over those of another.

I am not unmindful, as the majority opinion points out, that the Executive Council of the AFL-CIO has adopted the charity-substitute as an appropriate accommodation of individual religious needs. I do not regard this as persuasive on the validity of Section 701(j). No one in this day and age wants lightly to chance the charge of being considered as being guilty of any form of discrimination. When this moral pressure, given teeth by the specific legislative requirement of reasonable accommodation, is considered in the context of making the religious objector be out of pocket at least the same amount of money by payment to a worthwhile charitable organization, it is not surprising that the Executive Council would make the best of a situation even though it is contrary to an objective for which Unions generally have long fought.

The majority opinion, in addressing the constitutionality issue, relies heavily on *Rankins v. Commission on Professional Competence*, 24 Cal.3d 167, 593 P.2d 852 (1979), *appeal dismissed*, 444 U.S. 986, which, it is asserted, is binding on this court. That opinion of the California Supreme Court, a four-to-three decision, was indeed the subject of a dismissal on appeal as not involving a substantial federal question although three of the Justices "would note probable jurisdiction and set case for oral argument." 444 U.S. at 986. Nevertheless, this dismissal under *Hicks v. Miranda*, 422 U.S. 332 (1975), as the majority opinion points out, is a decision on the merits. *Rankins*, however, represents no more than an application of *Sherbert v. Verner*, 374 U.S. 398 (1963) which has never been expressly overruled, irrespective of what impact upon its viability may have resulted from *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).

The dismissal in view of *Sherbert* is not surprising when the facts of *Rankins* are considered. The plaintiff there simply sought to take off on his holy days and without pay. The California Supreme Court enjoined the dismissal of the plaintiff taking note: "There was no shortage of fully qualified substitute teachers who could be and were called in to replace him at no additional

cost to the district." 593 P.2d at 857. Also the California Supreme Court noted that permitting the absence of the plaintiff on his holy days did not constitute a "preference of one religion over another." 593 P.2d at 859. On the contrary, the regular school calendar provided holidays on the principal Christian holy days, so that the effect of permitting absences without pay to plaintiff on *his* holy days "is simply to lessen the discrepancy between the conditions imposed on [the plaintiff's] religious observances and those enjoyed . . . by adherents of majority religions," *id.*

As the company points out in its brief here, in this case, by contrast, the dues exemption creates a religious preference; it does not "lessen" one. In any event, the striking difference in the situations involved in *Rankins* and in the case at bar do not, in my opinion, make the dismissal of the *Rankins* appeal binding on this court. Those striking differences cannot be lightly brushed aside, as the majority would do, by being referred to as a distinction without a difference.

Having stated my opinion that Section 701(j) is unconstitutional, at least as applied in the present situation, I recognize the possibility of a reservation implicit in my discussion of the lack of reasonableness of the accommodation approved by the majority opinion. That reservation is brought to my mind by *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), in which this court held that the Board unconstitutionally exercised jurisdiction over lay teachers in parochial schools. The Supreme Court affirmed the result, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), but, in accordance with long established principles of reaching a decision if possible on grounds other than constitutional, held that the Board was exercising jurisdiction beyond the power given it by Congress. The Court recognized that the exercise of jurisdiction "would implicate the guarantees of the Religion Clauses," but declined "to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

Id. at 507.[2] Here, while I recognize the possibility that the case could be disposed of similarly, it does appear to me that in imposing upon employers, and sometimes on unions, the necessity of reasonably accommodating the diverse practices of the many different religions extant in this country, entanglement cannot be avoided and the challenged section should be struck down.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[2] It is of interest, and of some possible significance, that an amicus brief urging affirmance of this court's opinion in *Catholic Bishop* was filed in the Supreme Court on behalf of the General Conference of Seventh-Day Adventists.

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APPENDIX B

Opinions of the United States District Court for the Eastern District of Wisconsin

Nottelson v. A. O. Smith Corporation and Smith Steel Workers

Memorandum and Order dated Dec. 7, 1979
481 F.Supp. 756 (E.D.Wis 1979)
Memorandum and Order dated April 18, 1980
489 F.Supp. 94 (E.D.Wis 1980)
Judgment entered on April 18, 1980
Memorandum and Order dated Sept. 18, 1980

Copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedure.

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U.S. Dist. Court East. Dist. Wisc.
FILED
at ____ o'clock ____ M
RUTH W. LA FAVE, Clerk

DEC 7 1979

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

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LEGAL
A. O. SMITH
CORP.

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-[illegible]

A.O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS DIRECTLY AFFILIATED LOCAL UNION 190806, AFL-CIO,

Defendants.

MEMORANDUM AND ORDER

This is a civil action brought by plaintiff under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2. Plaintiff, a Seventh Day Adventist, alleges that defendants discriminated against him on the basis of his religion by discharging plaintiff for his refusal to join or contribute to defendant union. The following constitutes the findings of fact and conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure.

A court trial was held and the following facts developed. Plaintiff was employed by defendant company in 1947, and remained so employed until his discharge on July 11, 1975. For at least thirty years prior to plaintiff's discharge, defendant employer had been party to labor agreements with defendant union. Each agreement contained a union security clause which required all employees to join the union and pay dues as a condition of employment.

Plaintiff becaue a member of the Seventh Day Adventist Church in May 1966. The sincerity of his religious beliefs

is not questioned. A basic tenet of this religion provides that its members not join or financially support labor unions and similar organizations, although each member may personally decide whether to follow the tenet. In December, 1974, plaintiff notified the defendants that his religious beliefs prevented him from complying with the labor agreement's security clause. Plaintiff offered to contribute an amount equal to his union dues to a non-religious charity if defendants would attempt to accomodate his religious beliefs. As a good faith gesture, plaintiff made contributions of this amount to the American Cancer Society.

Defendants refused to accept plaintiff's offer as contrary to the union's constitution and bylaws. Defendant union, in a letter written on May 7, 1975, offered to remove plaintiff's name from its membership listings, but insisted that plaintiff continue to pay an amount equal to the dues to defendant union "for services both past and presently being rendered." Plaintiff rejected this offer because his religious beliefs prevented him from financially supporting a union. Plaintiff was discharged on July 11, 1975. After plaintiff exhausted his administrative remedies, this Court took jurisdiction of his cause of action.

Section 703 of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer -
> (1) to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . .

42 U.S.C. § 2000e-2(c)(3) also makes it an unlawful employment practice for a union to "cause an employer to discriminate against an individual in violation of this section." In

determining whether discrimination has occurred on the basis of an individual's religion, 42 U.S.C. § 2000e(j) defines religion as including:

> all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accomodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business.

The language of section 2000e(j) clearly applies to all types of religious observances and practices. "[T]he definition is what may be termed as an operative one: all forms and aspects of religion, however, eccentric, are protected except those that cannot be, in practice and with honest effort, reconciled with a business-like operation." Cooper v. General Dynamics, 533 F.2d 163, 168, cert. denied, 433 U.S. 908 (5th Cir. 1976); see McDaniels v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978). Thus, plaintiff's sincerely held religious beliefs fall within section 2000e(j) and defendants are subject to the statute's proscription against discrimination.

To establish a prima facie case of discrimination under 42 U.S.C. § 2000e-2(a), plaintiff must establish that: 1) he had a bona fide belief that union membership and the payment of dues are contrary to his religious faith as a Seventh Day Adventist; 2) he informed defendants employer and union of his views and that they were in conflict with the union security agreement; and 3) he was discharged from his employment due to his refusal to join defendant union and pay the required amount of dues. Yott v. North American Rockwell Corp., No. 78-1790 (9th Cir., Aug. 21, 1979); Burns v. Southern Pacific Transportation Company, 589 F.2d 403, 405 (9th Cir. 1978); Anderson v. General Dynamics Convair, 589 F.2d 397, 401 (9th Cir. 1978).

The evidence presented at trial shows that plaintiff satisfied his burden of establishing a prima facie case against defendants. Plaintiff, a Seventh Day Adventist, held a sincere belief in December 1974, in accordance with the tenets of his religion, opposing membership in and contributions to unions and similar organizations. The evidence also indicates that plaintiff, in December 1974, notified defendants that such belief prevented him from complying with the labor agreement's security clause requiring union membership and the payment of dues. He did, however, offer to contribute a sum equal to the amount of union dues to a non-religious charity. After many months of attempted conciliation between plaintiff and defendants, plaintiff was discharged by defendant employer on July 11, 1975 due to his refusal to comply with the security agreement.

Plaintiff was not required, in establishing a prima facie case, to accomodate his own religious beliefs before seeking a compromise by defendants. "While . . . plaintiff should be free, even encouraged, to suggest to his employer possible ways of accomodating his religious needs, we see nothing in the statute to support the position this is part of plaintiff's burden of proof." Redmond v. GAF Corp., 574 F.2d 897, 901 (7th Cir. 1972). "We agree . . . that the employee who has provided his employer with sufficient information to put it on notice is not required, as part of his prima facie case, to show that he thereafter made some efforts either to compromise or accomodate his own religious beliefs before he can seek an accomodation from his employer." Anderson v. General Dynamics Convair, 589 F.2d at 401, fn.3. Thus plaintiff, by informing the defendants of his sincerely held belief, did all that he was required to do to establish a prima facie case of discrimination in his discharge.

Once plaintiff has been shown to have established a prima facie case of employment discrimination, the burden then shifts to the defendants to "demonstrate that he is unable to reasonably accomodate . . . [plaintiff's] religious observance or practice without undue hardship on the conduct of the employer's business." Redmond v. GAF Corp., 574 F.2d at 901; see McDaniel v. Essex International Inc., 571 F.2d at 343.

> The Supreme Court and the Court of Appeals have made it clear that an employer has an affirmative obligation under Title VII to attempt to accomodate the operations to his employee's religious beliefs. An employee may demonstrate that he has complied with his legal obligation by showing any additional accomodation would be an undue hardship. Padon v. White, 465 F. Supp. 602, 607 (S.D. Tex. 1979); see Yott v. North American Rockwell Corp., supra; Anderson v. General Dynamics Convair, supra.

Thus, defendants must show that they made a good faith effort to accomodate plaintiff's religious beliefs, and that any further accomodation would create an undue hardship within the meaning of the statute.

In determining whether defendants have satisfied their burden, this Court recognizes that the existence of the union security agreement, requiring union membership and the payment of dues, does not automatically establish a lack of accomodation by defendants. The passage of Title VII in no way:

> precludes or trenches in any direct way upon an employer's making a union security agreement. He and his union can make any agreement they like and enforce it in the general run of cases - in all except the unusual one where compliance would run counter to a particular employee's religious conviction, sincerely held, that can be accomodated without undue hardship. Cooper v. General Dynamics, 533 F.2d at 170.

Thus, the thirty-year old security agreement between defendant employer and defendant union does not in itself lessen the effect of defendants' attempts to accomodate plaintiff's

religious beliefs. The agreement may not, however, lead to employment discrimination in its implementation.

Defendant union contends that section 2000e(j) is limited to employers and imposes no legal duty upon defendant union to make reasonable accomodation to plaintiff's religious beliefs. While section 2000e(j), which establishes the need for accomodation, specifically refers only to employers, defendant's contention is without merit. Title VII clearly imposes the same duty not to discriminate on a union as well as an employer. Yott v. North American Rockwell Corp., supra. As such, the ability of defendant union to accomodate to plaintiff's religious beliefs, and the effect such accomodation would have on defendant union may be considered:

> In enacting [§ 2000e(j)] Congress explicitly required a balancing between the religious needs of the individual and the legitimate business needs of an employer. By implication the same balancing applies to the needs of a union, at least where a claim of discrimination arises from the enforcement of the terms of a collective bargaining agreement. McDaniel v. Essex International, Inc., 571 F.2d at 344.

Proceeding to an analysis of defendants' attempts at accomodation, 42 U.S.C. § 2000e(j) and section 2000e-2(a) require defendant employer and defendant union to make reasonable accomodation for the religious observances of its employees short of incurring an undue hardship. While the statute is unclear as to the extent of accomodation required, the legislative history clearly shows that "Congress intended to require some form of accomodation." Trans World Airlines v. Hardison, 432 U.S. 63, 74 fn.9 (1971). The extent to which defendants have attempted a reasonable accomodation, and to which further accomodation would be an undue hardship must be analyzed according to the particular facts presented, since "the

decision ultimately turns on the reasonableness of the conduct of the parties under the circumstances of each case." Anderson v. General Dynamics Convair, 589 F.2d at 400.

In the present case, defendants rejected plaintiff's offer to donate the amount of union dues to a non-religious charity in return for a waiver of the defendant's security clause. Defendants offered, however, to keep plaintiff's name off of the union membership roll, but insisted that plaintiff contribute an amount equal to defendant union's dues to defendant union, for services past and presently being rendered. Plaintiff rejected this offer as contrary to the tenets of the Seventh Day Adventist Church. Where, as here, the effort made by defendants to accomodate plaintiff's religious belief is viewed as inadequate by plaintiff, the question becomes whether the further accomodation that plaintiff has requested constitutes undue hardship. Yott v. North American Rockwell Corp., supra.

This Court finds that the accomodation suggested by plaintiff, whereby plaintiff would contribute an amount equal to union dues to a non-religious charity, does not constitute undue hardship within the meaning of 42 U.S.C. § 2000e(j). The cost of an accomodation or its impact on workers must be greater than de minimus for undue hardship to be demonstrated. Trans World Airlines v. Hardison, supra; Yott v. North American Rockwell Corp., supra; Padon v. White, supra. Plaintiff's offer of accomodation would be only a de minimus cost to defendants. There is no evidence that many workers other than plaintiff would seek a similar accomodation due to their religious beliefs. Indeed, defendant union would lose only ten dollars a month, certainly a minimal amount, by allowing this single worker to pay that figure to a non-religious

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charity. In addition, plaintiff was not attempting to accept the benefits offered by defendant union as a free rider. He offered to fulfill this responsibility by contributing an amount equal to the union dues to a normal charity. As such, the cost to defendants of accepting plaintiff's offer would have been only de minimus.

"Undue hardship means something greater than hardship . . . Even proof that employees would grumble about a particular accomodation is not enough to establish undue hardship." Anderson v. General Dynamics Convair, 589 F.2d at 402. "An employer or union would have to show . . . actual imposition on co-workers or disruption of the work routine . . ." to establish undue hardship. Burns v. Southern Pacific Transportation Co., 589 F.2d at 401. Neither of these considerations are apparent in the present case. Allowing plaintiff to contribute the specified sum to a non-religious charity would not increase the amount or severity of duties required of his co-workers. Furthermore, no disruption of the work routine would occur because plaintiff would continue to perform all of his employment duties. Since there is no evidence that many other workers would seek similar accomodations, it is doubtful that substantial labor strife would be engendered from the acceptance of this one individual's offer of accomodation. Given the reasonableness of plaintiff's offer of accomodation and its de minimus cost, defendants have failed to carry their burden of establishing that its acceptance would constitute an undue hardship within the meaning of the statute.

For the foregoing reasons, judgment must be rendered for plaintiff. Plaintiff is therefore instructed to draft a form of judgment and present it to this Court within two weeks after the issuance of this memorandum and order.

This Court also notes that plaintiff has requested that he be awarded attorney's fees. Because the award of attorney's fees under Title VII is within the Court's discretion and neither party has discussed the propriety of their issuance, this Court will require the parties to submit briefs on this issue. Such briefs must be presented to this Court within one month of the issuance of this memorandum and order.

SO ORDERED this 7th day of December, 1979, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

FILED
SMITH W. LA FAVE, Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

APR 18 1980

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-220

A.O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,

Defendants.

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A.O. SMITH
CORP.

JUDGMENT

This action came on for trial before the Court, Honorable Robert W. Warren, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that by April 28, 1980, defendant A.O. Smith Corporation reinstate plaintiff to the position which he held at the time of his discharge as an employee of said defendant with all seniority rights and benefits and at the rate of pay of not less than the rate of pay to which he would now be entitled if he had not been so terminated from his employment.

IT IS FURTHER ORDERED that defendants A.O. Smith Corporation and Smith Steelworkers Directly Affiliated Local Union 19806, AFL-CIO recompense plaintiff for the loss plaintiff has sustained thereon including lost wages and all other benefits for each and every week from plaintiff's discharge until such time as this Judgment shall have been complied with, together with interest thereon at the rate provided by law. This amount, however, shall be offset by any interim earnings and employment compensation received during the period from plaintiff Smith's discharge to the date of reinstatement. This shall be a joint liability of

the aforesaid defendants. In the event the parties are not able to arrive at an agreed upon amount for said loss within a reasonable time, either party may petition the Court for a determination of the amount for which the said defendants are liable to plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Union shall accommodate plaintiff's religious convictions that proscribe plaintiff to neither join nor financially support a labor union in the manner hereinafter set forth only.

IT IS FURTHER ORDERED AND ADJUDGED that in lieu of the payment of Union initiation fees, dues and fees uniformly assessed for agency service fees, plaintiff shall authorize defendant Employer to withhold from plaintiff's payroll checks and pay a sum, equivalent to the Union initiation fees and dues and uniformly assessed fees paid by those employees of A.O. Smith Corporation covered by a Collective Bargaining Agreement that may from time to time be in effect between defendants, to a non-union, non-religious charitable organization mutually agreed upon by the plaintiff and defendant Smith Steelworkers D.A.L.U. 19806, AFL-CIO, and said defendant Employer shall obtain for the benefit of said Union a receipt from said charity evidencing to the Union this equivalent payment in lieu of union dues and fees unless otherwise agreed to by said parties. Plaintiff shall execute the necessary authorizations regarding his wages to defendant Company so that said payments to said charitable organization shall be automatically deducted from his paycheck.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall pay to a charity mutually agreed upon by plaintiff and the Union an amount equal to the union dues he would have owed had he not been discharged, i.e., covering the period from the time he was discharged until the time he is reinstated.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Company and defendant Union are hereby enjoined from any discrimination against plaintiff.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff shall be awarded his costs in this action.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff is entitled to an award of attorney's fees as prayed for him in his complaint in an amount to be determined by the Court if the parties cannot reach an accomodation.

IT IS FURTHER ORDERED AND ADJUDGED that defendant Union be and hereby is enjoined from litigating this matter in any forum other than by appeal from this Court.

IT IS FURTHER ORDERED AND ADJUDGED that this Court shall retain jurisdiction over this matter pending full compliance with the provisions of this judgment.

APPROVED: Robert W. Warren
UNITED STATES DISTRICT JUDGE

Dated at Milwaukee, Wisconsin, this 18th day of April, 1980.

RUTH W. LA PAVE
CLERK OF COURT

By: D. Bridelman
Deputy Clerk

copy mailed to attorneys of parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedures.

FILED
RUTH W. LA FAVE, Clerk
APR 18 1980

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

DARREL C. WOTTELSON,

Plaintiff,

vs. Case No. 75-C-22[illegible]

A.O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,

Defendants.

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A. O. SMITH
CORP.

MEMORANDUM AND ORDER

On December 7, 1979, this Court entered a memorandum and order resolving this action in plaintiff's favor. The memorandum and order constituted the Court's findings of fact and conclusions of law following a court trial on the merits of this case. Both defendants were found liable, but judgment has not been entered.

Defendants have filed briefs and motions raising several issues which they feel were left unanswered. Both defendants have also moved for reconsideration. Plaintiff has moved for an award of attorney's fees. Finally, several points must be clarified.

There are five issues which will be resolved in this opinion. In his complaint plaintiff sought relief under 42 U.S.C. § 2000e-2 (and the religious accomodation definition in 42 U.S.C. § 2000(e)(j)) and directly under the United States Constitution. The Court found liability under the statute without considering plaintiff's constitutional claim. Defendants argue that the Court should rule on the latter ground for relief. The next issue raised by the

defendants is their claim that 42 U.S.C. § 2000e(j) is unconstitutional because it is in violation of the establishment clause of the first amendment. The third problem raised by defendants involves an allocation of damages. The fourth issue involves plaintiff's request for attorney's fees. Defendants argue that since plaintiff was denied a request for a preliminary injunction, if attorney's fees are awarded to plaintiff he should not be granted fees for the hours spent pursuing the interim equitable relief. Finally, defendants have moved for reconsideration on the merits.

Looking first towards the merits the Court remains convinced that it ruled correctly in its December 7, 1979 memorandum and order. In Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027 (D. Ore. 1979), the court was faced with resolving a fact situation almost identical to the one presented in this Court; i.e., a plaintiff who refused to join a union or financially support it, but would contribute an amount equal to the union dues to a non-religious charity. The court held that plaintiff was entitled to relief because the defendants, union and company, had not proved that the payments of the $228.00 annual union dues to a charity would result in an undue hardship. This Court found the accomodation would impose only a de minimus hardship and as such does not cause defendants an "undue hardship" as defined in 42 U.S.C. § 2000(e)(j). See, e.g., Yott v. North American Rockwell Corp., 602 F.2d 904 (9th Cir. 1979). At this time this Court would again state that on this basis defendants have not shown that the accomodation would cause an undue hardship. Consequently, defendants' motion for reconsideration on the merits is denied.

Defendants' motion for reconsideration also raises a question of statutory pre-emption. They argue that labor questions are governed by the National Labor Relations Act (NLRA) which they assert preempts Title VII of the Civil Rights Act. Under 29 U.S.C. § 158(a)(3), (b)(2) of the NLRA unions are authorized to negotiate and enforce contract provisions calling for shops which are closed to all but union members. In Tooley v. Martin-Marietta Corp., 476 F. Supp. at 1027, the Court held that Title VII is an exception to the NLRA. The preeminence of Title VII over the NLRA was explained definitively by the court in McDaniels v. Essex International, Inc., 571 F.2d 338, 343 (9th Cir. 1979) where it held:

> This court is aware of the national policy of promoting labor peace which is served by the union security provisions of Taft-Hartley. Since July 2, 1964, however, there has been no national policy of higher priority than the elimination of discrimination in employment practices. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 47, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Section 701(j) of the 1964 Act requires more than reliance on Taft-Hartley. The union security provisions of Taft-Hartley do not relieve an employer or a union of the duty of attempting to make reasonable accomodation to the individual religious needs of employees.

See also, Anderson v. General Dynamics, Convair Aerospace Division, 589 F.2d 397 (9th Cir. 1979); Cooper v. General Dynamics, Convair Aerospace Division, 533 F.2d 163 (5th Cir. 1976), cert. denied, sub nom., International Association of Machinists and Aerospace Workers v. Hopkins, 433 U.S. 908 (1977). This tribunal will follow the cases cited and must conclude that Title VII takes precedence over the NLRA in the present case.

In so ruling the Court takes note of defendants' reliance upon recent congressional efforts to amend the closed shop provisions of the NLRA to require religious accomodation to show that Title VII was not intended to preempt the NLRA. Such action by Congress shows nothing. While the passage of an amendment to the NLRA may indicate that Title VII does not cover labor union closed shop agreements, it is equally plausible to assume that the actions of Congress are being undertaken to reconfirm its commitment to civil rights. The proposition that the proposed amendment to the NLRA is meant to clarify the preeminence of Title VII is confirmed by reading excerpts of the relevant floor debates. 126 Cong. Rec. H 763 (1980). Consequently, this Court must conclude that Title VII applies in the present case.

Turning now to defendants' request for a ruling on the constitutional claim raised in plaintiff's complaint, the Court would note that complete relief is available to plaintiff under Title VII of the Civil Rights Act. Consequently, a finding of liability or non-liability under the constitutional claim will aid neither party at this stage of the litigation. Defendants argue that, in the event this Court is reversed on its findings under Title VII, judicial economy would favor having the constitutional claim resolved. Nothing will be gained by resolving this issue now since, if the appeal results in an affirmance, this Court need never reach plaintiff's constitutional claim. If anything, economy favors silence at this time. As a result, no resolution will be made of plaintiff's alternative ground for relief.

Although plaintiff's constitutional claim need not be reached, defendant's constitutional attack on 42 U.S.C. § 2000e(j) must be considered. Several courts have ruled

that section 2000(e)(j) is unconstitutional. Under 42 U.S.C. §§ 2000(e)-2(a) and (b)(c), it is unlawful for a union or an employer to discriminate against an employee on the basis of religion. Section 2000e(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Defendants argue that section 2000e(j) conflicts with that portion of the First Amendment to the United States Constitution which provides: "Congress shall make no law respecting an establishment of religion . . ."

In several cases the constitutionality of section 2000e(j) has been questioned. Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), Celebrezze, J. Dissenting; Gavin v. People's Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979); Yoti v. North American Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), aff'd without the court reaching the constitutional issue, 602 F.2d 904 (9th Cir. 1979). Several courts have found the statute constitutional. Cummins v. Parker Seal Co., 516 F.2d 544 (9th Cir. 1975) aff'd 429 U.S. 65 (1976), judgment vacated on other grounds, 433 U.S. 903 (1977); Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027 (D. Ore. 1979); Brown v. General Motors Corp., 20 F.E.P. Cases 88 (W.D. Mo. 1978), rev'd on other grounds, 601 F.2d 956 (8th Cir. 1979).

This Court is drawn to the conclusion that under the facts in the present case section 2000e(j) does not offend the first amendment. The test to be used in deter-

mining whether a statute offends the establishment clause was outlined by the Supreme Court in Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1973):

> [T]o pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, . . . second, must have a primary effect that neither advances nor inhibits religion, . . . and, third, must avoid excessive government entanglement with religion.

This Court will follow the lead of the court in Tooley v. Martin-Marietta Corp., supra. Judge Solomon in his opinion held that section 2000e(j) is constitutional stating:

> It is a neutral provision with a satisfactory purpose--to prevent discrimination resulting from the unreasonable refusal to accomodate religious beliefs and practices. A reasonable accomodation will not favor plaintiffs or their religion because plaintiffs agree to contribute to charity an amount equal to union dues. A reasonable accomodation will not result in government entanglement with religion greater than that approved [by the Supreme Court in several cases]. . . . the religious accomodation provision promotes the free exercise of religion without violating the Establishment Clause. 1/

The facts in the present case are almost identical to those in Tooley and as applied to those facts section 2000e(j) is constitutional.

The next issue to be determined is the appropriate allocation of damages. Defendant Union claims that it should not be liable for backpay since defendant A.O. Smith was plaintiff's employer and Smith fired plaintiff, the Union did not. The Union further points out that the only steps it threatened to take if Smith did not fire plaintiff

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was to process a grievance to arbitration and to file an unfair labor practice with the National Labor Relations Board. Smith argues that it should not be liable for backpay since it was ready and willing to accomodate plaintiff's religious beliefs. Because the Union was adamant it fired plaintiff even though it could have avoided the issue by promoting plaintiff to a position not covered by the Union contract.

In this Court's opinion, each defendant is culpable. The Union for being so adamant; the employer for refusing to keep plaintiff on as an employee. While undergoing grievance proceedings may have cost Smith something, it could have lessened its exposure and the harm to plaintiff by not firing plaintiff. The prospects were not that dim. The Union, on the other hand, should have accomodated. They chose not to and must suffer the costs. The defendants are jointly liable for the damages plaintiff has suffered, and, barring agreement subsequent hereto, can anticipate the Court ordering each defendant to pay one-half of the residual backpay.

In determining those damages, three issues must be resolved. First, whether the backpay to be awarded to plaintiff should be reduced by unemployment compensation benefits received by plaintiff in the interim and earnings from other employment. Second, should plaintiff pay an amount equilavent to the union dues for the period in question to an acceptable non-religious charity. Finally, should plaintiff receive attorneys' fees and to what extent.

By the wording of the appropriate section of Title VII itself, 42 U.S.C. § 2000e-5(g), "Interim earnings or amounts earnable with reasonable diligence by the person . . .

discriminated against shall operate to reduce the backpay otherwise allowable." Likewise, unemployment benefits should also be deducted from the backpay award. See Association Against Discrimination in Employment, Inc. v. Weeks, 454 F. Supp. 758 (D. Conn. 1978). The record indicates that Smith has not reinstated plaintiff. Consequently his damages are not determinable at this time. Defendant Smith should reinstate plaintiff no later than April 28, 1980. Thereafter, the parties should meet to settle the amount of backpay to which plaintiff is entitled. If this issue cannot be resolved amicably, the Court will, of course, hold a hearing to resolve the amount of backpay owing.

It is the Court's considered opinion that plaintiff should contribute to a non-religious charity an amount equal to the union dues he would have owed had he continued to work at Smith during the relevant period. The non-religious charity must be one agreed upon by plaintiff and defendant Union. In attempting to settle damages, the parties should keep this holding in mind.

Turning to the attorneys' fee question, 42 U.S.C. § 2000e-5(k) provides:

> In any action or proceeding under this title [42 USCS §§ 2000e et seq.] the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

While the statute provides that an award of fees is discretionary, in all but the most unusual circumstances the prevailing party should be awarded attorneys' fees. See Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); Clanton v.

Allied Chemical Corp., 416 F. Supp. 39 (E.D. Va. 1976). There are no unusual circumstances present in this case and plaintiff will be awarded reasonable attorneys' fees.

Defendants suggest that the amount awarded should exclude fees for hours expended in plaintiff's pursuit of a request for a preliminary injunction which was not granted. In Batiste v. Furnco Construction Corp., 503 F.2d 447, 451 (7th Cir. 1974), cert. denied, 420 U.S. 928 (1975), the court held "the amount of the award [of attorneys' fees] should be proportionate to the extent that the party has prevailed in the suit." Since plaintiff prevailed in this lawsuit on his claim for discrimination, the merits of cause of action are established. Nevertheless the circumstances of the preliminary injunction proceedings indicates that plaintiff should be denied attorneys' fees incurred in pursuing that relief. The motion was denied and the action dismissed because plaintiff had not exhausted his administrative remedies before seeking relief here. This Court found that such exhaustion is a jurisdictional prerequisite to a suit under 42 U.S.C. § 2000e et. seq. See 42 U.S.C. § 2000e-5 (f)(1); Nottelson v. A.O. Smith Corp., 397 F. Supp. 928 (E.D. Wis. 1975). Defendants should not have to bear the burden of plaintiff's attorneys' fees expended in seeking relief to which he is not entitled. Consequently, an award of attorneys' fees will be appropriately reduced.

Although plaintiff is entitled to attorneys' fees, the Court is not in a position to award a specific amount. As with backpay both defendants are equally liable for the fees. In order to alleviate further unnecessary hearings, the parties should attempt to resolve this issue by agreement. If they cannot, of course, the Court will have to resolve

this issue. Absent an agreement, plaintiff should file a motion supported by affidavit requesting an award of a specific amount of attorneys' fees by May 15, 1980. Defendants have until May 30, 1980 to file a response. If necessary, a hearing will be held.

In resolving the pending issues, the Court notes that the defendant Union intends to litigate a grievance before the NLRB if Smith is reinstated. The Union claims that if plaintiff returns to his position with Smith, Smith will be in violation of its collective bargaining agreement with the Union. To permit the Union to file a grievance with the NLRB, in light of this Court's ruling, would result in a fundamental unfairness. Therefore, at the parties' request the Union is hereby precluded and enjoined from litigating this matter in any forum other than by appeal.

One final issue that must be resolved involves the question "Was plaintiff's refusal to give the equivalent of dues to the Union based upon a secular aversion to strikes rather than on a religious belief?" (Issue 9 of the issues submitted upon stipulation). The answer to this is an unequivocal "no." Nothing more need be said on this point.

Finally, the Court would note that it is entering judgment concurrent with the entry of this order. Any additional relief can be granted pursuant to the judgment.

Therefore, it is hereby ordered that defendants' motion for reconsideration on the merits must be and hereby is denied.

It is further ordered that defendants' attack on the constitutionality of 42 U.S.C. § 2000-e(j) as applied in this case be and hereby is denied.

It is further ordered that defendants are jointly liable to plaintiff for backpay and attorneys' fees as more fully set forth in this opinion.

SO ORDERED this 18th day of April, 1980, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

U.S. Dist. Ct. Filed
RUTH W. LA FAVE, Clerk

copy mailed to attorneys for parties by the Court pursuant to Rule 77(d) Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

SEP 18 1980

DARREL C. NOTTELSON,

Plaintiff,

vs. Case No. 75-C-22

A.O. SMITH CORPORATION, a foreign corporation, and SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO,

Defendants.

RECEIVED SEP 19 1980 LEGAL A.O. SMITH CORP.

MEMORANDUM AND ORDER

Three motions are currently before the Court in this matter. In the first motion, plaintiff, Darrel C. Nottelson, requests an award of attorney's fees. In the second motion, defendant Smith Steel Workers D.A.L.U. 19806, AFL-CIO ("Union"), asks the Court to stay those portions of its judgment of April 18, 1980 that would require the Union to pay any moneys to plaintiff prior to the resolution of this case on appeal and that enjoin the Union from litigating this matter in any forum other than by appeal from this Court. In the third motion, defendant A.O. Smith also asks the Court to stay that portion of the judgment that would require it to pay any moneys to plaintiff until this matter is resolved on appeal. In its motion, Smith also requests the Court, in the event it grants the Union's motion to proceed before the N.L.R.B., to require the Union to post such security as this Court deems proper for the protection of Smith. These motions will be the subject of this memorandum and order.

In its memorandum and order of April 18, 1980, the Court held that plaintiff is entitled to attorney's fees and

that both defendants are equally liable for the fees. The Court further ordered the parties to attempt to determine the specific amount by agreement. The parties have failed to reach such an agreement and plaintiff has presented its accounting to the Court.

Both defendants now argue that the Court should reverse its earlier holding and not award any attorney's fees to plaintiff. They assert that this suit was used to advance the tenets of the Seventh-day Adventist Church as those tenets relate to the financial support of labor organizations. Defendants argue, in essence, that a court order requiring them to pay the legal fees of the Church, in its attempts to promote particular religious objectives, would violate the Establishment Clause of the Constitution.

The Court cannot accept defendants' argument. The decision of this Court was based on the finding that the plaintiff was discharged because of his religious beliefs. As the prevailing party, he was awarded attorney's fees. What he intends to do with that money is his business. Furthermore, the Court sees no conflict arising under the Establishment Clause in awarding attorney's fees to a plaintiff who has been fired because he refuses to act in contradiction to his religious beliefs.

Defendants also contend that plaintiff's request for attorney's fees is excessive. Plaintiff's request for reasonable attorney's fees amounts to $19,734.30. This figure was based on a rate of $55.00 per hour charged in 1975; $60.00 per hour charged in 1976; $70.00 per hour charged in 1977; $75.00 per hour charged in 1978; and $85.00 per hour charged in 1979 and 1980. A total of 302.6 hours were spent in order to represent plaintiff's interests.

The Court has evaluated the request for fees in light of the criteria for determining appropriate attorney's fees set forth in Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976). Based on its evaluation, the Court concludes that the amount of hours spent on this litigation was not excessive in light of the fact that this case was the first of its kind in the Eastern District of Wisconsin and the Seventh Circuit Court of Appeals and involved substantial pretrial discovery.

The Court does not believe, however, that the complexity of the case rises to such heights that it warrants a departure from the hourly figure for attorney's fees normally awarded by the Court. Accordingly, the Court will award plaintiff $50.00 per hour for the 37.4 hours it spent in connection with this case in 1978, 1979, and 1980 and $40.00 per hour for the 265.2 hours it spent in connection with this case in 1975, 1976 and 1977. The total award to be paid by defendants is $12,478.00.

Turning next to the Union's request that it be allowed to file charges against Smith with the N.L.R.B., the Court sees no valid reason for modifying its ruling of April 18 on this matter. The Court's concern that it would be unfair to allow the Union to file a grievance with the N.L.R.B., continues today. Accordingly, the Union's request to file charges with the N.L.R.B. must be and is hereby denied.

With respect to defendants' motion for a stay of any payments to plaintiff pending appeal, the Court notes that such stays are given as a matter of right under Rule 62(d) of the Federal Rules of Civil Procedure if the appealing

party posts a bond in accordance with that rule. The amount of the bond to be posted is set by the trial court and usually is set in an amount that will permit satisfaction of the judgment in full, together with costs, interest, and damages for delay.

In the case at hand, the parties have not yet reached an agreement as to what the amount of back pay should be. Therefore, the Court does not have before it a dollar figure which will cover the amount of the judgment.

Notwithstanding the lack of a judgment for a sum certain, the Court believes a stay would be appropriate if a supersedeas bond in the amount of $40,000.00 were posted. Accordingly, upon the filing of a supersedeas bond in the amount of $40,000.00 and upon the approval of that bond by the Clerk of Court for the Eastern District of Wisconsin, those portions of this Court's judgment of April 18, 1980 requiring defendants to pay any moneys to plaintiff will be stayed.

Finally, the Union's request that the Court determine the validity of plaintiff's claim under Count II of the complaint must be denied since this Court now lacks jurisdiction to change its decision. Once a timely notice of appeal is filed, jurisdiction over all matters pertaining to the appeal passes to the court of appeals, and the district court is without authority to act further with regard to those matters, Elgin Manufacturing Corporation v. Vent Fabrics, Inc., 314 F.2d 440 (7th Cir. 1963).

In summary, plaintiff's motion for attorney's fees is granted for the amount indicated in this order. Defendants' motion to stay that portion of the judgment requiring them to pay amounts of money to the plaintiff will be stayed once

their supersedeas bond has been posted and approved by the Clerk of Court, Eastern District of Wisconsin. Defendant Union's motion to stay to allow it to proceed before the N.L.R.B. is denied. Defendant Union's request that the Court determine the validity of plaintiff's claim under Count II of the complaint is denied.

SO ORDERED this 19th day of September, 1980, at Milwaukee, Wisconsin.

Robert W. Warren
UNITED STATES DISTRICT JUDGE

APPENDIX C

Excerpt from the Legislative History of Section 701(j) of Title VII of the Civil Rights Act of 1964. Legislative History of the Equal Employment Opportunity Act of 1972, Volume 2, 711-715 (1972); also reported at Congressional Record, Volume 118, Part 1, 705-706 (92d Congress, 2d Sess., Jan. 21, 1972).

[Excerpt from the Legislative History of Section 701(j) of Title VII of the Civil Rights Act of 1964. Legislative History of The Equal Employment Opportunity Act of 1972, Volume 2, 711-715 (1972); also reported at Congressional Record, Volume 118, Part 1, 705-706 (92d Congress, 2d Sess, Jan. 21, 1972).[1]]

* * * *

The Senate continued with the consideration of the bill (S. 2515) a bill to further promote equal employment opportunities for American workers.

Mr. RANDOLPH. Mr. President, I send an amendment to the desk and ask that it be stated.

The ACTING PRESIDENT pro tempore. The Chair is advised that there is an amendment pending. Is the amendment of the Senator from West Virginia an amendment to that amendment or is the Senator asking that the pending amendment be set aside?

Mr. DOMINICK. Mr. President, I ask unanimous consent that the pending amendment, the Dominick amendment, be set aside temporarily so that the Senator from West Virginia (Mr. Randolph) may present his amendment, and that the Dominick amendment be taken up immediately after completion of the amendment of the Senator from West Virginia.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

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[1] This Appendix includes the legislative debate with respect to the enactment of Section 701(j). Senator Randolph also inserted into the record the court decisions in *Dewey* v. *Reynolds Metals Co.* and *Riley* v. *The Bendix Corp.*, both *supra*, as well as EEOC guidelines and regulations. *See* Legislative History, Vol. 2, *supra*, 715-776; Congressional Record, Vol. 118, Pt. 1, *supra*, 706-731. These latter documents are not included herein because of their length.

The amendment of the Senator from West Virginia will be stated.

The legislative clerk read as follows:

On page 33, after line 13, insert the following:

"(6) After subsection (i) insert the following new subsection (j):

"(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

Mr. RANDOLPH. Mr. President, it is my hope that we can have a roll-call vote on this amendment, not that there is opposition to the amendment itself, but it is felt that a rollcall would serve a constructive purpose.

I am grateful to my able colleague from Colorado for permitting me to use just a few minutes in presenting the reasons why I have proposed this amendment to the pending legislation.

Mr. President, I ask unanimous consent to include as cosponsors of the amendment the Senator from New York (Mr. Javits), the Senator from Maryland (Mr. Beall), and the Senator from California (Mr. Cranston).

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. RANDOLPH. Mr. President, freedom from religious discrimination has been considered by most Americans from the days of the Founding Fathers as one of the fundamental rights of the people of the United States. Yet our courts have on occasion determined that this freedom is nebulous, at least in some way. So in present-

ing this proposal to S. 2515, it is my desire and I hope the desire of my colleagues, to assure that freedom from religious discrimination in the employment of workers is for all time guaranteed by law.

I am sure that my colleagues are well aware that there are several religious bodies—we would call them religious sects; denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday. On this day of worship work is prohibited whether the day would fall on Friday, or Saturday, or Sunday. There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-day Adventists.

Mr. President, I am a member of a denomination which is a relatively small one, the Seventh Day Baptists. Perhaps there are only 5,000 individuals within that denomination in the work force. I do think it is important for me to say that within the groups that I have mentioned, we think in terms of our observance of the Sabbath beginning at sundown Friday evening and ending at sundown Saturday evening, following the Biblical words, "From eve unto eve shall you celebrate your Sabbath." I make this statement only by way of explanation of the groups I have just mentioned.

I think it is important for use to realize that the persons for whom I hope I speak—and I hope I speak for all persons in this matter—are workers scattered throughout the United States of America. There is no section of the country which would not be affected, we hope constructively, by the adoption of this amendment.

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.

I hold my membership in our church here in this area. We have the Washington Seventh Day Baptist Church. We have several of those churches in my State of West Virginia. At an earlier period I held my membership in the Salem, W. Va., Seventh Day Baptist Church.

I invite the attention of my able colleague to the fact that in the State of New Jersey there are many, many Seventh Day Baptist churches. In places like Shiloh, Marlboro, and Plainfield—actually being the headquarters of the denomination to which I belong, located close to New York City, but actually located in the State of New Jersey.

My own pastor in this area, Rev. Delmer Van Horne, has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment—not merely belief, but also conduct; the freedom to believe, and also the freedom to act.

I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State, or local governments. Unfortunately, the courts have, in a sense, come down on both sides of this issue. The Supreme Court of the United States, in a case involving the observance of the Sabbath and job discrimination, divided evenly on the question.

The amendment is intended, in good purpose, to resolve by legislation—and in a way I think was originally intended by the Civil Rights Act—that which the courts apparently have not resolved. I think it is needed not only because court decisions have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States, to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole are of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

Mr. President, the competent chairman of the Labor and Public Welfare Committee, who is the chief sponsor of S. 2515, and who is floor managing the very bill before us, I believe understands and appreciates, and I hope agrees with, the arguments that I am presenting. I have had some opportunity to counsel with him in reference to the amendment. I hope he can agree that there can be at least an agreement on the amendment, even though we have a roll call upon it, hopefully in the next few minutes. I think it is a well-intentioned amendment, a necessary amendment, a worthwhile amendment because it carries through the spirit of religious freedom under the Constitution of the United States.

Mr. President, I, therefore, urge most earnestly the adoption of the amendment.

Mr. DOMINICK. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield to my colleague from Colorado.

Mr. DOMINICK. I have listened very carefully to the Senator's presentation, and was impressed by it. Could the Senator tell me, whether this amendment would also affect, for example, the Amish, or some other religious sect which has a different method of conducting their lives than do most Americans?

Mr. RANDOLPH. Yes; I envisage that it would.

Mr. DOMINICK. Would it apply to the following situation? A young man I just talked to from Virginia, works 15 days on and then is off 15 days. Would the amendment require an employer to change that kind of employment ratio around, so that he would have to work a customary 5- or 6-day week?

Mr. RANDOLPH. I do not believe that an undue hardship would come to such an employer. The Senator has explained a specific case. I do not believe that there are really problems that would flow from the adoption of this amendment in connection with the employer meeting situations that he could not properly handle with employees.

Mr. DOMINICK. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country. It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered

with? In other words, flexibility is provided so that someone could make a discretionary judgment on it?

Mr. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps of discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

Mr. DOMINICK. I thank the Senator from West Virginia.

Mr. WILLIAMS. Mr. President, will the Senator yield?

Mr. RANDOLPH. I yield.

Mr. WILLIAMS. I did not follow the last colloquy entirely, and perhaps this is the same question, but where the employment is such that the job has to be done on a day that a person under his faith would make his religious observations, it might be an undue hardship to close down the operation to accommodate that person. There are jobs that are Saturday and Sunday jobs, and that is all, serving resorts and other areas. Certainly the amendment would permit the employer not to hire a person who could not work on one of the 2 days of the employment; this would be an undue hardship, and the employer's situation is protected under the amendment offered by the Senator from West Virginia, is it not?

Mr. RANDOLPH. That is correct; yes. I am in agreement with the Senator's statement.

Mr. WILLIAMS. It seems to me that this codifies a very worthy general practice, but there are situations—

Mr. RANDOLPH. There are the gray areas, and I recognize them. But I think the thrust of what we would have here is important at this time.

Mr. WILLIAMS. Yes.

Mr. RANDOLPH. The purpose to be achieved.

Mr. WILLIAMS. The Senator and I are employers. As a matter of practice, we recognize the days of religious observations of some of our staffs, even though they are regular working days, generally, of the Senate, its committees, and its officers.

Mr. RANDOLPH. That is correct. I know of many instances of that kind. I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind and heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and, hopefully, understanding and a desire to achieve an adjustment; and if in perhaps a very, very small percentage of cases that is not able to be accomplished, that should not deter the Senate in its action in approving this amendment.

Mr. WILLIAMS. As I read the first amendment of the Constitution, there is no problem here presented by the amendment in connection with the first clause:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard.

I certainly agree with the objective of the amendment.

APPENDIX D

Constitutional Provision and Statutes Involved

Constitutional Provision:

Amendment I: Freedom of religion, speech and press, peaceful assemblage, petition of grievances.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions:

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1):

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin;. . .

Section 701(j), 42 U.S.C. §2000e(j):

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief,

unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3)

(a) It shall be an unfair labor practice for any employer -. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . .

APPENDIX E

Order of the United States Court of Appeals for the Seventh Circuit Denying Smith's Petition for Rehearing and Suggestion for Rehearing En Banc (April 20, 1981)

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

April 20, 1981.

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

DARREL C. NOTTELSON, Plaintiff-Appellee and EQUAL EMPLOYMENT OPPORTUNITY COM'N, Intervenor-Appellee, No. 80-1678, 80-1705 vs. SMITH STEEL WORKERS D.A.L.U. 19806 and A. O. SMITH CORPORATION, Defendants-Appellants	Appeal from the United States District Court for the Eastern District of Wisconsin. No. 75-C-220 Robert W. Warren, Judge.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing en banc filed in the above-entitled cause by defendants-appellants Smith Steel Workers and A. O. Smith Corporation and the responses thereto, a vote of the active members of the Court was requested, and a majority* of the active members of the Court have not voted to grant a rehearing en banc. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Chief Judge Fairchild and Circuit Judges Pell, Wood and Bauer voted to grant the petition.